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ABSTRACT

The nine articles in this collection deal with theoretical and practical freedom of speech issues. Topics discussed include the following: (1) freedom of expression in Thailand and India; (2) metaphors and analogues in several landmark free speech cases; (3) Supreme Court Justice William O. Douglas's views of the First Amendment; (4) the San Francisco, California, campaign for Gay rights; (5) academic freedom and the pornographic film "Deep Throat"; (6) Alexander Solzhenitsyn's approach to free expression; and (7) Supreme Court rulings in 1980-81 concerning free speech. A freedom of speech bibliography concludes the volume. (HTH)

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Note to Contributors

This issue completes the term of the present Editor. Manuscripts for the 1982 Free Speech Yearbook should be sent to the new Editor: H. L. Ewbank, Jr., Speech Communication Department, The University of Arizona, Tucson, Arizona 85724.

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The H. A. Wichelns Memorial Award for the most significant contribution to the Free Speech Yearbook was established in 1974 to honor Herbert Wichelns, a pioneer in the speech communication discipline and an early advocate of the importance of the speech-law aspects of speech communication.

1981 Award Recipient: Janice Schuetz, University of New Mexico

FREEDOM OF EXPRESSION IN SOUTHERN ASIA
I. POLITICAL REALITIES AND CULTURAL EXPECTATIONS: FREEDOM OF SPEECH IN THAILAND

Robert F. Martin
Oregon College of Education at Monmouth

Constitutional government is a relatively new concept in Thailand's political history. William Blanchard, author of Thailand, Its People, Its Society, Its Culture, reports that because no word for "constitution" existed in Thai language prior to 1932, the men who toppled the monarchy and adopted a western-style constitution invented the word "radthathamanun." When information teams went to the villages to explain that the country was now ruled by "radthathamanun," "the villagers, for centuries accustomed to personal rule, would ask, 'Whose child is Radthathamanun?'"[1]

Born of an impulse for freedom of popular expression and democratic government, the Thai constitution is viewed by pessimists as a document more symbolic than substantive, an imported western invention mocked by ambitious men, corrupt elections, a respect for personality rather than political philosophy and an ominous trend towards political violence. Yet the constitutional assurance of freedom of speech, a source of pride for Thai people, has motivated numerous attempts at democratic government and has survived fourteen coup de etat, thirty-eight Cabinets and fourteen versions of the Constitution. It reads:

> Every person enjoys liberties of speech writing, printing and publication. Restrictions on such liberties may not be imposed except by virtue of the law specifically enacted for the purpose of safeguarding the security of the State or rights, liberties, honour, or reputation of other persons or maintaining public order or good morals preventing public moral or health degeneration.[2]

Restrictions, not liberty, have been the rule. For example, it is illegal today for more than five Thai citizens to gather for political purposes. Yet Thais consider their Kingdom the last bastion of freedom in Southeast Asia. The Thai language word for Thailand, "prathaet thai," translates to "land of the free."

The United States and Thailand, amicable allies for nearly 135 years, share a common constitutional provision--freedom of speech. Americans perplexed by the paradoxes and apparent hypocrisy of Thai attitudes towards freedom of speech might benefit from an analysis of political and cultural reasons for the peculiar definition and practice of freedom of speech--Thai-style.

I

For centuries Thailand's monarchs ruled absolutely and by personal whim; no legal guarantee of freedom of expression existed and public debate of government policy was unheard of. For example, King Chulalongkorn (1868 - 1910), displeased with pioneer Thai journalist T.V.S. Wannapho's newspaper articles concerning the government, jailed Wannapho who is now remembered as Thailand's first political prisoner.[3] In 1932, a clique of rebellious military officers and civil servants staged a coup de etat which overthrew the monarchy and installed a constitutional, parliamentary government led by Pridi Phanomyong. Described as "an ideologue who wanted to introduce philosophical, political questions for debate," Pridi advocated a socialist economic plan too radical for his followers who branded him a communist and forced him into exile in Paris until 1935.[4]

The 1932 Thai constitution, based on British, French and American models, allowed Thai citizens to "enjoy" freedom of speech as long as they did not speak against the royalty, endanger national security or undermine public morality. Pridi's successor, Phraya Phahon, interpreted the constitutional wording narrowly and refused to allow the formation of political parties, arguing that the country was not ready for them. In July, 1932, Pridi had abolishd censorship, but in October Phraya closed four newspapers because they had criticized his government. From 1933 to 1934, seventeen Thai newspapers were closed for "unsatisfactory" attitudes toward the government. In 1938, the military government tightened its control of expression by authorizing the Press Office to close any unfriendly paper for one month and the Ministry of Interior to extend closings indefinitely.[5] The paradox of constitutionally granted freedom of expression and the government's denial of those freedoms continued for the next seventeen years.

In the summer of 1955, Prime Minister Pibul Songkram returned from a trip to the United States. Inspired by his observation of the relatively unfettered freedom of expression in America, Pibul relaxed press censorship and established a "speakers' corner" in a popular Bangkok park. While enjoying their new freedom of expression, speakers so bitterly denounced the governmenr that, under the pretext of Southeast Asia Treaty Organization (SEATO) military maneuvers and the rising threat of internal communist subversion, Pibul revoked press freedom, cancelled the Hyde Park experiment and jailed several political enemies. Some critics argue that the unusual brevity of the experiment in democracy demonstrates that Pibul's real purpose in encouraging freedom of speech was to draw out his secret political enemies, not to encourage public debate of issues facing the nation.[6]

The icy political winds sweeping this tropical kingdom during the 1950s could not cool the hot rhetoric of a small but determined reform movement. In 1958, Thai military leaders, alarmed by the drift toward democracy and all its untidiness, successfully engineered a bloodless coup which punished people of conscience: over two hundred speakers, artists, writers, journalists and editors were imprisoned without trial on vague charges of being communists.[7] The Cold War years saw the rise of fanatical anti-communism in Thailand; the government frequently resorted to the red-herring tactic of branding as communist anyone who openly challenged government policies. Prime Minister Sarit Thanarat, described by one Thai journalist as "a staunch opponent of the press," jailed over fifty journalists on anti-government charges.[8] During the 1960s the Thai military solidified its control over the government. General Praphas Charusathien, strongman of the military dictatorship in the late 60s, exemplified the military establishment's contempt for democratic forms of government. In reply to a request that he head a new political party, Praphas said, "Being engaged in politics means standing in filth and becoming stained with filth."[9]

The October, 1973, arrest of twelve pamphleteers near Thammasat University in Bangkok began the most dramatic attempt in Thai history to give meaning to the Thai constitution. Police brutally broke up a demonstration by students demanding the release of the pamphleteers and a return to constitutional government. On October 10, over 100,000 people mobbed Bangkok streets to demonstrate against the government. The government refused to capitulate and counterattacked by labeling the activist students communist infiltrators. Troops occupied Thammasat University, scene of bloody rioting on October 12 and 13. By October 14, 100 people had died and only the intervention of King Bhumipol Adulyadej on behalf of the students prevented more casualties and a total breakdown of law and order in the city. The King ordered out of the country Field Marshall Thanom Kittikachorn, his son Colonel Narong and the despised General Praphas. With the installation of the country's first elected civilian government, it seemed that a new era of political freedom had arrived in Thailand.[10]

The intellectual journalist and democrat, M. R. Kukrit Pramoj, publisher of Thai Rath, the nation's most widely read newspaper, assumed leadership of the civilian government. Dedicated to forging a democracy based on citizen participation down to the village level, Kukrit enacted a Land Reform Act which provided

$25,000 to local tambon (regional) councils to use as the people saw fit; he hoped that by giving such large sums to local officials previously suspected of graft with much smaller sums, he would tempt citizens to exercise their freedom of speech and hold local leaders accountable.[11] Kukrit's populist tendencies might have contributed to his failure to mold a stable coalition of military civil service and civilian political leaders. On January 12, 1976, he resigned. His elder brother, Seni Promoj, reluctantly accepted leadership of a shakey government wracked by waning public patience over continuing student demonstrations.

A bloody military coup in October, 1976, brought to an abrupt end the most recent and important experiment with freedom of speech in Thailand's history. In a lightening reaction against Seni's inability to control university student and labor movement demonstrations, the Thai police and army closed all universities in the country, seized millions of "communist inspired" books, suspended publication of all newspapers and arrested more than 4,000 people, including many of Thailand's most noted authors, journalists and student leaders. Prime Minister Thanin Kraivichien banned the teaching of all political theories, including "democratic concepts." In an October 13 nationwide radio broadcast Kraivichien announced to Thai citizens that it would be at least four years before national elections and ten years until a return to full democratic rule. What was needed for Thailand, he said, was a "Thai-style democracy."[12]

Not surprisingly, the new military regime, in spite of its repressive policies, received support from all levels of Thai society. Increasing rice prices, rising crime rates and the weekly, sometimes daily, demonstrations by univeristy students and labor unions soured citizens against the grand experiment in freedom of speech and participatory democracy. Section 40 of the 1979 constitution granted freedom of speech but Prime Minister Kriangsak, though more liberal than his predecessor, maintained a state of national emergency during which constitutional guarantees were suspended. Newspaper editors, while free to publish, had to be on their best editorial behavior to avoid unwelcome visits by government officials. In June and September, 1979, Bangkok police raided city bookstores and confiscated thousands of "Communist-inspired" books.[13] The government allowed university student newspapers to publish articles on "education, culture, sports and music," but strictly prohibited the use of student newspapers as "political organs."[14] Political debates on university campuses were prohibited. Prime Minister Kriangsak denounced the suggestion of broadcasting Thai parliamentary debates, claiming that "there is a possibility that the law makers will use the broadcast in an improper way to campaign for themselves."[15] In response to M.P. Kukrit Pramoj's plea for parliamentary debates over Thailand's most pressing problem in 1979, the waves of Vietnamese, Laotian and Cambodian refugees washing over Thailand's borders, Kriangsak cavalierly retorted, "Even if we have consultation with them [Thai political parties], the result would come out just the same. So don't try to make such rhetoric."[16]

The eagerly awaited April, 1979, national elections offered little hope for the revival of public debate and government tolerance for the exercise of free speech. Violence and voter apathy marred the campaign; at least ten candidates and campaigners were murdered, and on election day a disappointing 23% of the eligible voters turned out.[17] Using the Vietnamese invasion of Cambodia and the unstable political situation in Laos as pretexts for a declaration of emergency, the government continued to hold constitutional guarantees in abeyance. Given the military government's proven ability to strengthen the economy, attract foreign investment back to Thailand after the 1973 student revolution and end noisy demonstrations in the capital city, most Thais did not begrudge the sacrifice of freedom of speech, a concept regarded as not immediately relevant to pressing realities of daily life.

II

The sources of Thai national apathy toward freedom of speech (and politics in general) lie deep in political traditions and cultural expectations which provide the average citizen a stable economy, a reassuring sense of place in

society, a vast degree of personal freedom and pride in the fact that Thailand--land of the free--has never been subjugated by a foreign power.

Pre-constitutional Thai politics revolved around the divine, secular right of the King to rule absolutely. Thai citizens respected strong, central, paternalistic leadership.[18] For seven centuries of Thai sovereignty the majority of the population led self-sustaining existences in which political involvement, if any, began and ended in the villages. National politics were left to the King and his regal advisors. The monarch's absolute control over national politics was the natural order of society. Political life at the village level allowed a man to share in village government "not because he was an individual with inalienable rights, but because he was a villager with village status and membership."[19] In a simple, stable, predictable economic order in which villagers shared a belief in the moderating, individual-centered philosophy of Buddhism, there was little motivation for public debate of government policy. Although the 1932 revolution stripped the King of political power, the King retains his status as the single most important source of national unity.[20] Though Thailand is increasingly urbanized, traditional attitudes towards the political process endure. As of 1970, approximately 89% of the population lived in village society where a man's most important immediate responsibilities are to his family, to the local wat (Buddhist temple) and, recently, to the village school.[21] His ultimate political loyalty, regardless of who is sitting in the Prime Minister's office and the Parliament, is to the King.

This respect for the King and the expectation of strong leadership is a source of comfort and pride to Thai people and a strong argument for Thai military leaders to use against students clamoring for more freedom of speech and political action. Strong rule, it is argued, has enabled Thailand, of all Southeast Asian nations, to remain free of military conquest and colonial rule. Military leaders have attacked representative government and pointed to its failures in India, the Philippines and Singapore.[22] It is not uncommon for Thais to express the opinion that "we are not ready" for a democratic form of government.

Students, journalists and intellectuals have forged the vanguard of all movements for greater freedom of speech in Thailand. But the majority of Thai people perceive the exercise of freedom of expression to influence policy or redress government as a nontraditional, even perilous influence on the stability of society. Sulak Sivaraksa, a Thai social critic, argues that for the "common man," the political risks of challenging higher authority by publicly expressing contrary opinion far outweigh the potential benefits to society:

> People who are outside the circle of affluence and power are left alone to lead their own lives if they do not express opinions antagonistic to the interests of the wealthy and powerful; but if they do, they will be branded as Communists or traitors to Thailand even though these views may be in the interests of the common people.[23]

Sivaraksa points out that public expression of demands for freedom and rights has yet to become a political tradition in Thailand. He believes that even if the government closed the Social Science Review, Thailand's most prestigious journal of academic opinion, "only a handful of people will decry its demise. The majority of people would not feel the effect of the closure at all."[24]

Sivaraksa's opinions reflect the fact that the wording of Section 40 of the Thai constitution not only provides that citizens "enjoy" freedom of speech; it also recognizes the government's right to pass laws which abridge freedom of speech and exempt from free public dispute fundamental issues of national defense, civil rights and social morals. Every citizen "enjoys liberties of speech" unless the government enacts a law for the specific purpose of safeguarding the "security of the State or rights, liberties, honour or reputation of other persons or maintaining public order or good morals preventing public moral or health deterioration." For example, in response to the student

uprisings of 1973 and 1976, to Vietnamese hegemony in Laos and Cambodia and to internal communist insurgency, the government enacted Article 200. This legislation preserved the constitution in name only and essentially suspended freedom of speech by allowing the Prime Minister to "issue any order or to carry out any action that is necessary for the prevention or the stopping of any activity which endangers the security of the Kingdom . . . or threatens peace or order or good public morals." Freedom of speech is to be "enjoyed," but it is not guaranteed. Liberal Thai intellectuals and others who admire the American constitutional ideal of freedom of speech might view Thai constitutional limitations of free speech as repressive. But Thai traditionalists can justify them as contributing to social harmony which, as will be seen later, is an important thread in the Thai cultural fabric.

The Thai traditions of respect for central, authoritarian power and abstinence from public comment on political matters might account for attitudes toward freedom of speech that baffle westerners, especially Americans who believe in public debate and decentralized power. Edward Stewart writes in American Cultural Patterns: A Cross-Cultural Perspective, that in non-western countries with centralized governments, there is considerably more respect for direct orders, explicit instructions and a personal bond between subordinate and supior. "American preference for persuasion may be seen as a threat to others."[25] The heritage of seven centuries of absolutist rule, thirteen military coup de etat since 1932, the development of a highly centralized political authority in Bangkok, and the failure of the 1973 democratic revolution to improve life for the average Thai are political realities which have shaped Thai attitudes towards freedom of speech. Underlying the national apathy toward and suspicion of politics are Thai values and cultural expectations.

Perhaps on the strength of Thailand's reputation as the only Southeast Asian nation to escape foreign colonialism, and due to a tradition of care-free personal lifestyle often referred to as the "mai pen rai" (never mind, don't worry about it) syndrome, Thailand has swathed its national image in a cloak of independence and freedom. A 1971 survey of Thai perceptions of national character revealed that 99.5% of the villagers interviewed identified Thai citizens as "freedom loving."[26] Even a casual reckoning of Thai political history suggests just the opposite. But it is true that Thais value freedom of personal (nonpolitical) action. Perhaps the fundamental value of Thai society is individualism, "expressed in the feeling, that, within wide limits, each man is and should be responsible only to himself. . . ."[27] This individualism, seen in the context of a restrictive, authoritarian political system, allows for freedom of action within one's social status and role if it does not call undue attention to oneself, publicly embarrass another person, or challenge the authority of the power elite. According to the U.S. government Area Handbook for Thailand, "society is an elaborate hierarchy of status in which each individual sees himself as above or below, but seldom equal to, those around him."[28] A 1960 survey of Western-educated Thai civil servants disclosed that they placed higher value on traditional Thai virtues--being benevolent, calm, self-assured, and authoritative towards subordinates and respectful, attentive, and compliant toward superiors--than they did on Western bureaucratic attributes such as technical competence, intelligence and skill in decision-making.[29] A 1965 study of village channels of communication revealed that "95% of those interviewed prefer to get news from personal sources rather than mass media (newspapers, radio), and that this preference is attributable to respect for persons in authority."[30]

There is considerable peer pressure to maintain one's place in society, to avoid public confrontation with or embarrassment of those of higher status. In other words, one is free to pursue his personal life, to assert his individualism, provided that he does not challenge political authority. This pressure for harmony, characterized by personal humility and a clear-cut system of rank and place in society, legitimizes respect for authority, discourages political protest, and diminishes the importance of freedom of expression as an integral part of day-to-day life. Taken as a whole, these values and cultural expectations reflect an attitude known as kreng jai.

To be kreng jai is to be self-effacing, respectful, humble and considerate of other people--to avoid embarrassing, disturbing, or intruding upon them. According to Rangsii Hansopa, Professor of Social Sciences at Thailand's Prince of Songkla University, this personal value influences political behavior in Thailand and is, to some extent, responsible for Thai reluctance publicly to express political opinions.[31] In a June, 1979, speech to the Foreign Correspondents' Club of Thailand, Boonchu Rojanastien, President of the Bank of Thailand and deputy leader of the Social Action Party, partially blamed the snail's pace development of democratic thought in Thailand on kreng jai. He challenged his countrymen to accept that for Thailand to become a great nation, "we must begin with a change in our attitude, killing the concept of kreng jai in public forums though not necessarily in our private lives."[32] Boonchu went on to propose a set of "modern" attitudes that Thailand must adopt if it is to overcome centuries of stiffling tradition; his prescription included "a readiness to express opinion."[33]

III

For the immediate future the defining lines of freedom of speech in Thailand will be drawn by the "Thai-style" democracy imposed by the military rulers and by the cultural expectations and values that form the unique character of the Thai people. The universities will continue to be the focal points of liberal thought and to initiate reform movements characterized by the desire for greater freedom of speech. But it is unlikely that the Thai middle class will welcome the students', journalists' and the intellectuals' rhetoric of reform. Dr. Puey Ungphakorn, former rector of Thammasat University and a leading Thai economist, explained in 1976, just prior to the Thanin coup, that most Thai citizens were not ready to accept the "sheer novelty" of the students' "aggressive, uncontrolled political action" after the 1973 revolution; the basic reasons for Thai mistrust of the liberal movement, he said, are its "lack of practical experience" and "the fact that most of the liberals are young, impatient and loud in a society that venerates elders, patience and gracious behavior. . . ."[34]

Robert Shaplen, dean of American Southeast Asian observers, believes that despite their "comfortable convictions and easy ways" and because the Thais have never had to fight for freedom from Western imperialism, "they have never really analyzed or defined their basic contemporary institutions of government." Their attempts at parliamentary, constitutional government have, in Shaplen's opinion, "produced more chaos and confusion than common purpose and sustained achievement."[35]

Bulwarked by Thai conservative political and cultural traditions, by vivid memories of bloody student insurrections and by immediate internal and external communist military threats, the military-dominated government will not, in the foreseeable future, loosen its grip on civil liberties.

Meanwhile, the Carter administration increased United States commitment to the defense of Thai sovereignty. In 1978 the U.S. provided $24 million of economic assistance and increased military equipment sales credits to Thailand from $24 to $30 million.[36] It is inevitable that some Americans question the ethics of U.S. support of a government that gives freedom of speech with one hand and systematically suppresses it with the other. Those who bristle over this paradox should remember, though, that fundamental political and cultural differences form the frame through which the development of freedom of speech in Thailand must be viewed.

Endnotes

[1]William Blanchard, Thailand: Its People, Its Society, Its Culture (New Haven: Human Relations Area File Press, 1958), p. 119.

[2]Ivan Nudannayake, ed., Thailand Year Book, 1975-76 (Bangkok: Temple Publicity Services, 1975), p. C 51.

[3]"Ups and Downs of the Thai Press," Bangkok Post, 1 August, 1979, p. 1.

[4]Blanchard, p. 122.

[5]Blanchard, p. 122.

[6]Blanchard, p. 226

[7]Sulak Sivaraksa, "The Role of Intellectuals in Thailand," in Trends in Thailand: Proceedings and Background Papers by M. Rajaretnam and Lim So Jean, eds. (Singapore: Singapore University Press, 1973), p. 52.

[8]M.W. Lin, "Press Freedom in Southeast Asia," Bangkok Post, 11 Feb. 1972, p. 13.

[9]Quoted in Robert Shaplen, Time Out of Hand (New York: Harper and Row, 1969), p. 302.

[10]For a description and interpretation of the October, 1973 revolution and its aftermath, see David Morell, "Political Conflict in Thailand," Asian Affairs (January-February, 1976), pp. 131-184.

[11]Morell, p. 170.

[12]New York Times, 14 Oct. 1973, p. 8, c. 1.

[13]"Sutham's Book Confiscated," Bangkok Nation, 17 June 1979, p. 3, c. 1.; "Monchair Orders Communist Books Seized," The Southeast Asia Record, 21-27 Sept. 1979, p. 6, cols. 1-2.

[14]Author interview with Mr. Chaorat Cherdchai, Assistant Professor of Journalism, Thammasat University, Bangkok, May 28, 1979.

[15]Bangkok Nation, 31 May 1979, p. 8.

[16]Ibid., p. 1.

[17]"The Thai Shoot-Out," Newsweek, Asian edition (April 13, 1979), p. 17.

[18]John W. Henderson, et. al., Area Handbook for Thailand (Washington, D.C.: USGPO, 1971), p. 3.

[19]Blanchard, p. 118.

[20]Robert Shaplen, A Turning Wheel: Thirty Years of the Asian Revolution (New York: Random House, 1979), pp. 113-114.

[21]Henderson, p. 53.

[22]Morell, pp. 153-155.

[23]Sivaraksa, p. 49.

[24]Ibid., p. 57.

[25]Edward C. Stewart, American Cultural Patterns: A Cross-Cultural Perspective (LaGrange Park, Illinois: Intercultural Network, Inc., 1972), p. 48.

[26]Nobuo Ando and Yoshio Gondo, "Education and Culture in a Thai Rural Community: A Report of the Field Research in Tambon Bang Khen, Thailand, 1970-1971," (Kyushu, Japan: Kyushu University Faculty of Education, 1973), p. 81.

[27]Henderson, p. 77.

[28]Ibid., p. 78.

[29]Ibid., p. 64.

[30]Paitoon Crungao, "Village Channels of Communication in Northeast Thailand: A Pilot Study," (Bangkok: United States Operations Mission Communication Media Division, January, 1965), n.p.

[31]Author interview with Mrs. Rangsii Hansopa, Assistant Professor of Social Sciences, Prince of Songkla University, Pattani, Thailand, July 6, 1979.

[32]"Thailand Needs Strong Authority," Bangkok Nation Review, 29 June 1979, p. 2.

[33]Ibid.

[34]"Interview with Dr. Puey Ungaporn," Bankok Bank Monthly Review (March, 1975), p. 155.

[35]Shaplen, A Turning Wheel, p. 93.

[36]Harry Kamm, "Thailand Steps Up Its Arms Purchases from U.S.," New York Times, Sec. A, 6 Jan. 1980, p. 6, cols. 1-6.

NB: This study originally appeared in a slightly different form in the Western Speech Communication Association's Freedom of Speech Newsletter, VII (December 1980), 3-10. It is reprinted here by permission.

FREEDOM OF EXPRESSION IN SOUTHERN ASIA
II. THE CONTRIBUTION OF JAYAPRAKASH NARAYAN IN PRESERVING FREE EXPRESSION IN INDIA

Allen H. Merriam
Virginia Polytechnic Institute and State University

In 1980 Freedom House published a report on the status of human rights throughout the world. According to that report India qualifies as the only "free" nation on the entire Asian mainland between Japan in the East and Israel in the West--a distance of some 6,000 miles inhabited by over two billion people.[1] Viewed in global perspective the survival of free expression in India thus becomes an important concern.

As the world's largest democracy, India possesses a notable legacy of civil freedom. The concept of local self-government is rooted in the institution of the traditional village council (panchayat). The Indian commitment to political freedom intensified during the colonial rule of Great Britain, whose own heritage of individual liberty inspired several generations of Indian freedom fighters. Winning independence in 1947, India developed a system of parliamentary democracy which has few equals anywhere in the Third World.

India's policy of free speech suffered a severe if temporary setback, however, in the 1970s. On June 26, 1975 Prime Minister Indira Gandhi declared a state of emergency which lasted for nineteen months. During this time as many as 150,000 people were arrested, newspapers were censored, and dissent was essentially eliminated.[2] The emergency represented a profound and, in the view of Mrs. Gandhi's critics, an unjustified threat to India's commitment to civic freedom.[3] According to a distinguished diplomat:

> On the day the emergency was declared, the legal position was that every citizen's right to life and liberty was suspended, not merely the right to liberty, but the right to life. . . . Then another law was passed stating, "No citizen of India shall be entitled to claim liberty on the ground of common law, natural law, or rules of natural justice." There is no parallel in the history of jurisprudence to this barbarous law.[4]

A central figure in the controversy over political suppression in India in the 1970s was Jayaprakash Narayan (affectionately referred to in India as "J.P."). Long respected as an advocate of radical social reform based on the principles of Mohandas Gandhi's philosophy of nonviolence, J.P. came into sharp confrontation with the Indian government before and during the emergency. This essay attempts to interpret his influence on the fortunes of free expression in contemporary India.

Background

Jayaprakash Narayan was born in Bihar (northern India) in 1902. As a youth he experienced the revolutionary climate created by Gandhi's campaigns to end British colonialism. Travelling to the United States to study sociology and economics, J. P. read and became enamored of Marxist literature. Upon returning to India he taught sociology at the prestigious Benares Hindu University. Jailed for participation in the civil disobedience movement prior to Independence, J. P. won notoriety for his outspoken advocacy of socialism.

In 1952 J. P. renounced active party politics, dedicating himself to the Sarvodaya Movement led by Vinoba Bhave, which sought to create a classless social

order based on equality of opportunity, non-violence, rural reconstruction, and land reform. J.P.'s style of leadership, like that of Mohandas Gandhi's, was spiritually rather than legally based, concerned more with the purification of the human spirit than with the corrupting influences of partisan politics.[5] J.P.'s considerable following among India's students and peasants stemmed in large measure from his personification of the ancient Hindu value of tyag (the renunciation of ambition).

In the early 1970s J.P. became increasingly vocal in his criticism of the political and economic conditions in his native Bihar, long one of India's poorest states. In 1972 he wrote that "dissent . . . is . . . a necessary catalytic agent to which society owes its progress, its revolutions, its technological and scientific advances. Without dissent society must become stagnant and moribund."[6] Identifying India's major problems as corruption, hunger, unemployment, inflation, casteism, and ignorance, J.P. issued an "Appeal to the Youth" in December, 1973, urging a peaceful struggle against these evils. Two meetings with Indira Gandhi in 1973 convinced J.P. that her government was incapable of achieving the systemic change he felt was required. With insight that proved prophetic, J.P. warned of

> . . . the extinction of free platform and press, of opposition parties, of all trade unions, except the official ones, of all such institutions and organisations as do not agree with the ruling party.[7]

The "J.P. Movement"

In 1974 J.P.'s campaign intensified. While ostensibly aimed at the dissolution of the Bihar Legislative Assembly for its alleged corruption, repression of dissenters, and ineffectiveness in combating unemployment and inflation, the "J.P. Movement" now took on national dimensions as a rallying point for many groups opposed to the Congress Party monopoly. The Movement adopted Sampoorna Kranti ("Total Revolution") as its motto, and promoted the slogan:

> Sampoorna Kranti ab naaraa hai;
> bhaavi itihas hamaara hai.
> (Total Revolution is our slogan:
> Future history belongs to us.)[8]

J.P.'s increasing popularity was evident in the huge crowds he attracted at rallies in Patna on June 5, 1974, and again on November 18, when as many as 400,000 people attended. Urging all students to boycott classes for a year, J.P. argued that "the education system does not teach them anything, it does not train them for any work."[9] He continued to call for land redistribution, agricultural development, a return to decentralized village rule (gram raj), and the elimination of casteism, elitism, corruption, high prices, and unemployment. J.P. asked his followers to block trains by squatting on the tracks and he accused All-India-Radio of broadcasting "lies" and "one-sided views."[10]

Urged to assume the leadership of a united opposition party, J.P. steadfastly refused, claiming that he sought no personal power but only a better democracy and the people's welfare: "the struggle is not for the capture of power . . . for the replacing the Congress government with the opposition, but for the purification of government and politics, including those of the opposition."[11]

By the spring of 1975 Indira Gandhi's government was in serious jeopardy. The prime minister had been convicted by the Allahabad High Court of illegally using government employees to aid her 1971 election campaign. Black marketeering, communal riots, and droughts increased civil unrest. Morarji Desai, a popular opposition leader, undertook a hunger strike to protest alleged corruption in the Gajarat Legislative Assembly. On March 6, 1975, J.P. led over 500,000 demonstrators in an "All India People's March" in New Delhi, presenting

a charter of demands to the Indian Parliament. In an interview a month later J.P. labelled Mrs. Gandhi the "fountainhead of all authoritarianism of the ruling Congress" and a "threat to democracy."[12]

The climax to the drama came in June. On June 24th the Indian Supreme Court issued its decision on Mrs. Gandhi's appeal of the Allahabad decision, upholding her conviction. The next day J.P. addressed a large rally in Delhi calling for a nationwide satyagraha (civil disobedience campaign) to bring down her government. He called on the army, police, and civil servants "not to obey any orders they considered illegal."[13] Before dawn the following day J.P. and hundreds of other opposition leaders were arrested as Indira Gandhi invoked the emergency under Article 352 of the Indian Constitution.

This review of events preceding the emergency suggests that J.P.'s role in Indian politics in 1975 was ambivalent. While he represented a major advocate of free speech and dissent, his mobilization of the masses behind a call for "Total Revolution" helped precipitate the very suppression he feared. The emergency resulted from the government's perception of impending civil anarchy, the Congress Party's insecurity produced by convictions in the courts, and Indira Gandhi's personal propensity for autocratic behavior when feeling trapped. A biographer described the emergency decision as Mrs. Gandhi's "defensive reaction against threats to her self-esteem" and quite consistent with her tendency to shift quickly from aloofness to aggressiveness when personally challenged.[14]

Mrs. Gandhi defended her action with the classic argumentation based on the perception of a clear and present danger to the public welfare. She told an interviewer:

> The state of emergency was proclaimed because the threat of disruption was clear and imminent. . . .I do not believe that a democratic society has the obligation to acquiesce in its own dissolution. I do not believe that a democratic society need be defenseless against those who would paralyze it. I do not believe that a democratic society cannot take strong measures to deal with its foes, from within or without.[15]

While acknowledging that some excesses were committed by the police and overzealous local officials, Mrs. Gandhi continued to maintain that the majority of Indians supported her decision to insure the continued functioning of the nation's vital public services.[16] But the critics remained unpersuaded, claiming that "she treated dissent as defiance and criticism as conspiracy" so that the emergency degenerated into a reign of witchhunts, brutality, and suppression.[17]

J.P.'s Words from Prison

The imprisonment of Jayaprakash Narayan prompted the aging idealist to produce a quantity of statements in defense of liberty. J.P.'s statements on human freedom and free speech form part of his Prison Diary, a document that seems destined to insure its author a permanent place in the annals of Indian democracy. The Diary opens dramatically: "My world lies in a shambles all round me."[18] Lamenting the suppression of freedom and "the abyss of personal dictatorship," J.P. wrote: "this tightening grip of death on our democracy . . . makes my heart weep."[19]

J.P. aimed his sharpest attacks against Indira Gandhi, whom he characterized as both "by inclination and conviction a dictator."[20] He charged her with trying to "strangle democracy to death and clamp down her dictatorial regime" and likened her to Adolph Hitler who also had used constitutional methods in assuming dictatorial powers.[21] From his prison cell J.P. exclaimed: ". . . the arrests, the emergency proclamation, the suppression of the freedom of the press and of the citizens' fundamental rights of expression and association (among others) plus the legal and constitutional amendments add up to one single objective: to keep Mrs. Gandhi safe and warm."[22]

On July 21, 1975, J.P. wrote a personal letter to Mrs. Gandhi in which he sought to justify his own methods of protest while eloquently appealing to her pride in India's heritage:

> In a democracy the citizen has an inalienable right to civil disobedience when he finds that other channels of redress or reform have dried up. It goes without saying that the Satyagrahi willingly invites and accepts his lawful punishment . . . It staggers one's imagination to think that so valuable a freedom as freedom of the press, the very life-breath of democracy, can be snuffed out because of the personal pique of a Prime Minister . . . . You inherited a great tradition, noble values, and a working democracy. Do not leave behind a miserable wreck of all that.[23]

The prime minister did not respond to that letter, nor is it clear that she even ever received it. In September J.P. wrote to the Home Secretary in New Delhi complaining that nineteen of twenty letters he had sent from jail had been held up by the authorities, amounting to censorship and "mental torture."[24]

In October J.P. stated in his Diary that "nobody except the enemies of democracy can be taken in by Mrs. Gandhi's hysterical propaganda," and he decried the "shameful" way she had "played havoc with the laws of the land to suit her personal interests."[25] With admirable directness J.P. articulated a principle of political authority which has universal applicability, and which Richard Nixon and the Shah of Iran among many others might well have remembered: "Those elected to positions of power cannot be outside the scope of the law . . . . Discipline is a quality of individual and group behavior which has to be inculcated and nurtured in an atmosphere of freedom, i.e., in a condition in which there is a choice of action."[26]

While in prison J.P. developed a serious kidney ailment and on November 12, 1975, after 139 days of confinement, he was released and admitted to a hospital in Bombay. Meanwhile, desirous of legitimizing her rule in world opinion and perhaps overestimating her popularity, Mrs. Gandhi lifted the emergency in January, 1977, and called for a national election. J.P. suggested that the opposition parties unite under the Janata (People's) Party banner and make the election a referendum on the emergency. In the voting in March Mrs. Gandhi and the Congress Party were swept from office by a margin of 299 parliamentary seats to 153.

J.P. played a prominent role in the formation of the new government. Referred to by The New York Times as "the 74-year old mystic whom the Janata Party regards as the keeper of its spiritual force,"[27] J.P. consulted with key party members prior to announcing that Morarji Desai would be the new prime minister. Early in the morning of March 24, 1977--the day the government changed hands--J.P. administered an oath to the new leaders at Rajghat, the memorial site where Mohandas Gandhi had been creamated in 1948. Still seriously ill and confined to a wheelchair, J.P. led the politicians, phrase by phrase, in pledging to "serve our people and give our best to the weakest among them."[28]

Some three weeks later J.P. made a broadcast to the nation from his sickbed. He explained how the Bihar and Gujarat movements centered on demands for political and economic reforms, sought to eliminate corruption and illiteracy, remove casteism, and improve the educational system. J.P.'s kidney condition soon deteriorated further, and he died in Patna on October 8, 1979. Half a million people attended his cremation and the placing of his ashes in the Ganges River. Among those to travel to Bihar to pay their last respects to the old revolutionary was Indira Gandhi.

Evaluation

16

We have seen that Jayaprakash Narayan exerted a pivotal impact on Indian

politics in the 1970s. True to the tradition of Hindu holy men he never held an official governmental position, yet his influence pervaded the years when civil liberty underwent its severest test in independent India. J.P.'s crusdade to purify India of corruption and his resistance to infringements of democratic freedoms made him a hero to millions of Indians.

J.P. was a fallible human being. Critics may rightly charge that he failed to offer specific policies by which to implement the radical social and economic changes he sought. The revolutionary and even anarchistic dimensions of his movement in no small way invited the governmental responses of the emergency. The lawlessness implicit in J.P.'s own modus operandi contributed to the suppression he so strongly opposed. This fact is often overlooked in romanticized reviews of his life which border on hagiography.[29]

Given the significant social upheaval which J.P.'s movement unleashed, one might legitimately ask if it is justifiable to apply the traditional, liberal Western concept of freedom to a non-Western society like India. Since experiments with democracy have met with meager success in most Third World nations where illiteracy remains high and domestic politics volatile, can we assume that individual self-expression and free speech are universal values? In other words, is the notion of "freedom" culture-bound?

Certainly ideas of what constitutes acceptable communication behavior vary from culture to culture. For example, in traditional China and to a lesser extent in ancient India, deeply ingrained social patterns and rituals effectively precluded the exercise of individual persuasion and advocacy in the Western sense. Oliver pointed out that in Asia the historic function of discourse was "not to enhance the welfare of the individual speaker or listener but to promote harmony."[30] Similarly, Marxist ideology holds that true freedom becomes possible only in the context of the group. As a Soviet writer argued,

> The individual is free to the degree that he makes use in his activity of the opportunities open to a class, i.e., to the degree to which he, in his own activity, expresses what is necessary for that class. . . . Moral freedom is the conscious direction of one's own desires, the guidance and cultivation of them in such fashion that they, becoming based on societal necessity, promote the maximum expansion of the possibilities inherent in man.[31]

Japan represents another society unsympathetic to a communication style based on the competing claims of assertive individuals. Indeed, the Japanese characteristically mistrust language, relying instead on a largely nonverbal process of intuitive understanding known as haragei.[32] This orientation finds logical extension in the Zen Buddhist belief that ultimate freedom comes not through speech but through meditation and silence.

But if the qualitative constructs of freedom vary due to cultural and ideological presuppositions, it is equally true that there are different kinds of freedom. For example, one may speak of physical, moral, psychological, political, or intellectual freedom. In a thoughtful analysis of modern India, Erdman identified three major kinds of freedom:

(1) moksha, referring to salvation or spiritual liberation from the endless cycle of rebirth central to Hindu thought;

(2) swaraj, denoting self-rule or political independence; and

(3) swatantra, representing self-control through freedom from external and governmental constraints.[33]

The conflict between Jayaprakash Narayan and Prime Minister Gandhi in 1975 can thus be viewed as the clash of different interpretations of freedom. Mrs. Gandhi, by imposing the emergency, sought to maintain the functioning of the nation's vital services while restoring a sense of order and discipline to the body politic. The widespread profiteering, hoarding and lawlessness present in Indian life at that time made her actions plausible if not welcome to millions of peasants victimized by soaring prices and corrupt officials. The reduction of hunger and exploitation, even when accompainied by restrictions on the right to dissent, can be viewed as a kind of freedom.

J.P.'s appeal, on the other hand, was to a high moral idealism. In seeking to arouse Indians to a spiritual revolution, he condemned a government which had subverted constitutional norms and therefore, in the opinion of many, had forfeited the right to govern. Few can deny that J.P.'s diagnosis of India's problems was essentially correct. Moreover, his vision of personal purity and social justice touched the conscience and imagination of a people. J.P.'s denunciations of tyranny, embodied most succinctly in his Prison Diary, form an enduring testament to the values of free expression and civil liberty.

Endnotes

[1]"A World Divided: Free and Not So Free," U.S. News and World Report (February 4, 1980), 28-29. Sri Lanka, a small island nation off the Asian mainland, and Turkey, whose recent military coup resulted in martial law, were also included as "free" Asian nations.

[2]For a description of this period by a prominent Indian journalist see George Verghese, "Press Censorship under Indira Gandhi" in The Third World and Press Freedom, ed. Philip C. Horton (New York: Praeger, 1978), 220-230.

[3]For a sampling of writings critical of the Emergency see Promila Kalhan, Black Wednesday (New Delhi: Sterling, 1977); D.R. and Damala Mankekar, Decline and Fall of Indira Gandhi (New Delhi: Vision Books, 1977); Kuldip Nayar, The Judgement (New Delhi: Vikas, 1977); Janardan Thakur, All the Prime Minister's Men (New Delhi: Vikas, 1977); and Uma Vasudev, Two Faces of Indira Gandhi (New Delhi: Vikas, 1977).

[4]Nan A. Palkhivala, "U.S.-India Relations: The New Potential," East-West Perspectives 1:1 (Summer, 1979), 29.

[5]For a perceptive discussion see Joan V. Bondurant, "The Nonconventional Political Leader in India" in Leadership and Political Institutions in India, ed. Richard L. Park and Irene Tinker (Princeton: Princeton University Press, 1959), 279-298.

[6]Jayaprakash Narayan, Towards Total Revolution, ed. Brahmanand, IV (Bombay: Popular Prakashan, 1978), 3-4.

[7]Ibid., p. 37.

[8]Ibid., p. 26.

[9]Ibid., p. 78.

[10]Ibid., p. 112.

[11]Quoted in Henry C. Hart (ed.), Indira Gandhi's India: A Political System Reappraised (Boulder, Colorado: Westview Press, 1976), p. 10.

[12]Narayan, IV, p. 142.

[13]Quoted in Stephen P. Cohen, "The Military," in Hart, pp. 207-208.

[14]Mary C. Carras, Indira Gandhi in the Crucible of Leadership: A Political System Reappraised (Boulder, Colorado: Westview Press, 1976), p. 10.

[15]"Prime Minister Indira Gandhi Responds to Charges that Democracy in India is Dead," Saturday Review (August 9, 1975), pages 10 and 48.

[16]Mrs. Gandhi expressed these sentiments during an audience with U.S. Fulbright scholars, attended by this writer, at the Prime Minister's residence, New Delhi, India, August 2, 1980.

[17]Swadesh Rana, The Emergency in India; Recent Indian Publications, news and reviews from ERC, No. 12 (New Delhi: Educational Resources Center, 1977), p. 27.

[18]Jayaprakash Narayan, Prison Diary, ed. A. B. Shah (Seattle: University of Washington Press, 1978), p. 1.

[19]Ibid., pages 15 and 5.

[20]Ibid., p. 3.

[21]Ibid., pages 2 and 9.

[22]Ibid., p. 28.

[23]Ibid., pages 105, 104 and 108.

[24]Ibid., p. 70.

[25]Ibid., pages 91 and 95.

[26]Ibid., pages 79 and 80.

[27]"New Delhi Swears in Desai as 4th Premier," The New York Times (March 25, 1977), p. A6.

[28]Quoted in Henry Kamm, "New Leaders Pay Homage to Gandhi at his Shrine," The New York Times (March 25, 1977), p. A6.

[29]Illustrative of this type of biographical writing is Pushpa Bharati, Jayaprakash Narayan (Bombay: India Book House Education Trust, 1980).

[30]Robert T. Oliver, Communication and Culture in Ancient India and China (Syracuse: Syracuse University Press, 1971), p. 261.

[31]A. P. Chermenina, "The Concept of Freedom in Marxist-Leninist Ethics," in Intercommunication Among Nations and Peoples, ed. Michael H. Prosser (New York: Harper and Row, 1973), pp. 489-490.

[32]Muneo Yoshikawa, "Some Japanese and American Cultural Characteristics," in Michael H. Prosser, The Cultural Dialogue: An Introduction to Intercultural Communication (Boston: Houghton-Mifflin, 1978), p. 228.

[33]Howard L. Erdman, "Freedoms in Contemporary India," Common Ground II:4 (October, 1976), p. 35.

NB: An earlier version of this study was presented at the 1980 Convention of the Speech Communication Association.

FIRE, SNAKES, AND POISONS: METAPHORS AND ANALOGUES IN SOME LANDMARK FREE SPEECH CASES

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> Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.
>
> Benjamin Cardozo[1]

. . . we all of us, grave or light, get our thoughts entagled in metaphors, and act fatally on the strength of them," declares one of the characters in novelist George Eliot's Middlemarch.[2] Some Supreme Court Justices have commented on such entanglement and warned against making law based on a figure of speech. In 1948, the Court decided in McCollum v. Board of Education that "released time" for religious instruction classes during the school day in public school buildings was unconstitutional, Justice Black stating that:

> . . . the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.[3]

Justice Frankfurter said in his concurring opinion: "Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not a fine line easily overstepped . . ."[4]

In his dissenting opinion Justice Reed objected to the reliance on the metaphor:

> Thus the "wall of separation between church and state" that Mr. Jefferson built at the University [of Virginia] which he founded did not exclude religious education from that school. The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.[5]

Justice Stewart shared Reed's concern for basing legal decisions on figures of speech. Said Stewart in a school prayer case in 1962: " . . . I think that the Court's task, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution."[6]

In his article titled "On the Use of Metaphor in Political Analysis," Martin Landau has warned that while we speak and write in metaphors,

> The consequence may be more than felicity of phrase, for though figurative language can provide powerful analytic tools, it can also be the source of distortion and misrepresentation. Analysis is a function of the language we employ, and frequently [quoting William Empler] "our thoughts do not select the words we use; instead, words determine the thoughts we have." When this happens, language may impose on entities properties they do not in fact possess, or relationships that do not in fact exist . . . In any case, the consequences of metaphoric expres-

> sion, both substantially and methodologically, should not be minimized."[7]

"The trouble with metaphors," says Monroe Beardsley, "is that they have a strong pull on our fancy. They tend to run away with us. Then we find that our thinking is directed, not by the force of argument at hand, but by the interest of the image in our mind."[8]

An examination of some of the landmark Supreme Court freedom of speech opinions reveals some dubious metaphors and analogues which were used to define the character of a variety of anti-World War I, anti-conscription, anti-capitalistic speeches, writings, and groups. The consequences of the Court's metaphoric expression "should not be minimized." The thoughts of the Court became "entangled" in the metaphors and the Court "fatally" acted on the strength of them.

I

In 1919, the United States Supreme Court upheld the convictions of Eugene Debs, Jacob Frohwerk, Charles Schenck, Elizabeth Baer, Jacob Abrams, and others who had been sentenced up to twenty years in prison for their utterances against U.S. participation in World War I, against compulsory conscription, against Wall Street, against capitalism.[9] Within a decade, the Court also upheld the convictions of Socialists, Communists, and Anarchists such as Benjamin Gitlow and Charlotte Anita Whitney.[10]

The fire metaphor and analogue became an important part of both the Schenck and Gitlow opinions upholding the convictions of those involved in these two landmark cases. The Court's use of the fire metaphor and analogue resulted in the appellants' speech being identified with the fear, perils, and destructiveness associated with fire.

After describing and discussing the content of Schenck's anti-conscription, anti-capitalist circular, Chief Justice Holmes enunciated his "clear and present danger" test along with his "falsely shouting fire in a theatre and causing a panic" analogue. Said Holmes:

> . . . the charcter of every act depends upon the circumstances in which it is done . . .The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic . . . The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger. It is a question of proximity and degree.[11]

Holmes did not use as his analogue a situation in which a person stands on a street corner and shouts out political insults or a situation in which a person distributes religious pamphlets so offensive to others that a breach of the peace may occur. He did not use as his analogue a situation involving persuasive discourse. By using the "falsely shouting fire" analogue Holmes succeeded in attributing to Schenck's speech the dangers, immediacy, and seriousness implied in "falsely shouting fire in a theatre and causing a panic."

But the analogue is not applicable to Schenck's speech, Schenck's distribution of anti-conscription circulars. One may very well agree that the First Amendment does not protect the person who falsely shouts fire in a theatre and causes a panic, but this analogue is irrelevant to Schenck's denunciations of the war and compulsory conscription. We know through experience what will happen if a person falsely shouts fire in a theatre and causes a panic; some people are going to get hurt or killed. The causal relationship between the "speech" and the danger is clear. In Schenck's case, however, there is no evidence at all that any person had refused to enter the military service as a result of reading Schenck's anti-conscription circular. Since two of the three charges against Schenck dealth with conspiracy to violate the Espionage Act, no

evidence of actual obstruction of the recruiting service was needed, according to Holmes. This element of conspiracy makes the analogue even less relevant for the "falsely shouting fire" analogue contains nothing remotely related to conspiracy. Yet the impression of a nexus between the two becomes difficult to avoid since Holmes has said, in effect, that just as a person cannot expect First Amendment protection for falsely shouting fire in a theatre and causing a panic, so too cannot Schenck expect protection for his speech.

While it can readily be ascertained whether it is true that someone falsely shouted "fire" in a theatre, whether there was a fire, whether there was a panic, determining the truth or falsity of Schenck's anti-conscription opinions claiming that compulsory conscription was "despotic" and that such conscription was defended by "cunning politicians" and the "mercenary capitalistic press"--determining the truth or falsity of such opinions is quite different. The analogue blurs the important distinction between proving the falsity of what is shouted by the person in the theatre, "Fire!" falsely blurted out, and the falsity of the opinions expressed by Schenck in his circular.

Further, the analogue is inapplicable since Holmes combines two elements, falsely shouting "fire" and causing a panic. In the case of Schenck, there is no evidence at all that his "false" opinions led to anything but indifference. There was nothing comparable to the "panic" side of the analogue. The presentation of the "falsely shouting fire in a theatre and causing a panic" within the context of the Schenck case is misleading, both in terms of the first part of the analogue related to the "falsity" and in terms of the second part "and causing a panic." Schenck's speech was neither "false" nor did it have a comparable "panic" effect.

Clearly, the imminence and degree of the danger emanating from Schenck's distribution of anti-conscription circulars had little to do with the imminence and degree of danger coming from the act of falsely shouting fire in a theatre and causing a panic. But once one accepts the analogue as appropriate in this case, once the analogue has the effect of creating "a strong pull on our fancy," to use the words of Monroe Beardsly, "then we find that our thinking is directed, not by the force of argument at hand, but by the interest of the image in our mind." Once one is committed to the analogue as appropriate, once the association is established in one's mind between "falsely shouting fire in a crowded theatre and causing a panic" and Schenck's "Conscription is despotism . . . Do not submit to intimidation," once that association is made and that commitment is made, the decision to find against Schenck must follow.

II

One week after the United States Supreme Court decided against Schenck, it also decided against Jacob Frohwerk who had been convicted of violating the 1917 Espionage Act. Holmes again using a fire symbol to justify restrictions on speech. Frohwerk had published in the Missouri Staats Zeitung some articles questioning the constitutionality of compulsory conscription to send U.S. troops to France and claiming "we went to war to protect the loans of Wall Street." Holmes delivered the opinion of the Court, inserting into his opinion the "kindle a flame" metaphor: " . . . it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."[12]

As in Schenck's case, there was no evidence that Frohwerk's words had any effects on the war effort, that anybody was persuaded by his articles. But these rather ineffectual articles published in a small Missouri newspaper, according to Holmes, might have found their way into "quarters where a little breath would be enough to kindle a flame." Once Frohwerk's speech was identified with the extreme danger that can be caused by kindling "a flame," the Court's decision to uphold Frohwerk's conviction was inevitable. The metaphor carries with it the implication that speech that would lead to "a flame" is too dangerous to be allowed.

The "kindle a fire" metaphor was used again by the Court in another early landmark freedom of speech case, Gitlow v. New York.[13] This time the metaphor is more extended than in Frohwerk. In 1920 Benjamin Gitlow and three others were convicted for violating New York's Criminal Anarchy statute and sentenced to 5-10 years in prison. Gitlow had distributed several thousand copies of a "Left Wing Manifesto" that, in the words of the Court, "advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government." In 1925, the United States Supreme Court found against Gitlow, even though it admitted that "there is no evidence of any effect resulting from the publication and circulation of the Manifesto." The "Manifesto" may have had no effect, but the Court declared that "utterances inciting to the overthrow of organized government by unlawful means" did by their very nature, involve danger to the public peace and to the security of the State. "They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen." It was then that the Court used the fire metaphor, which once accepted as a legitimate metaphorical argument, meant that there was no way that the majority could give Gitlow's speech First Amendment protection:

> A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily and unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.

Once Gitlow's speech was associated with "a single revolutionary spark," kindling a fire which "may burst into a sweeping and destructive conflagration,"--once that association was established--the decision to uphold Gitlow's conviction was inevitable. The danger was compounded, of course, since the spark was identified with "enkindled," kindling being easily lit; a spark placed into kindling more often than not will quickly lead to flames. But the Court majority seemed to want it both ways: it wanted to convey the imminence of the danger through the phrases "kindle the fire" and "enkindled the flame," yet it appeared to recognize the danger was not so imminent since it spoke of "a fire, smouldering for a time." While a smouldering fire can be dangerous, it is usually smokey and smelly; in fact, the word "smoulder" is derived from the German word for "smell." A smouldering fire is detectable, usually it is there for all to see and smell. An alert government would not be threatened by a "smouldering fire."

In the sentence immediately preceding the "revolutionary spark" statement, the Court used a metaphor that was a reflection of a metaphor used in the brief presented to the United States Supreme Court by the State of New York in Gitlow v. New York. Writing for the Court majority in Gitlow, Justice Sanford referred to "utterances inciting to the overthrow of organized government by unlawful means" presenting a "sufficient danger of substantive evil to bring their punishment within the range of legislative descretion":

> Such utterances by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the public peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale.

Both argued that the precision of mathematics or the jeweler's scale is not needed to "measure" the imminence of the danger or the danger itself, both thus relieving themselves of the need to establish precision in the matter of carefully defining the danger and its imminence. The use of these metaphors made it

much easier to decide against Gitlow for it was enough to conclude that the danger from his speech was "potential," was going to become serious in the "near future."

III

In the same brief for defendant-in-error, the State of New York used still another comparison, the snake metaphor, in arguing for upholding Gitlow's conviction:

> It cannot be that the Government is powerless to act until the plotters have perfected their plans and are ready to strike the fatal blow. If the Government were bound to delay its action until the arrival of the time for the striking of the blow, it might then be too late, and the Government might perish because of its failure to take seasonable protective measures. The time to kill a snake is when it is young.

Once Gitlow was metaphorized into a snake, it was but one small step to justifying his "eradication." But the difficulty with the snake metaphor is that all snakes are not dangerous, some snakes are indeed useful. Surely we cannot kill all young snakes just as we cannot kill all "revolutionary" ideas when they are "young." To kill both at that stage of development would, in many cases, cause more harm than good. Some young snakes mature into useful reptiles. Likewise, some young revolutionary ideas eventually develop into acceptable and beneficial social and political policies.

But, of course, the snake conjures up in the minds of most readers creatures which ought to be killed: snakes slither; snakes are hard to handle; snakes blend into the terrain; snakes are dangerous. The metaphor is particularly inappropriate since one widespread fear of snakes is based on the fact that they are often difficult to detect for they do blend in with the terrain, and they do strike quickly. On the other hand, Gitlow did not surreptiously blend into the terrain. He openly published and distributed the "Left Wing Manifesto," a thirty-four page document described by Zachariah Chafee, Jr. in Free Speech in the United States in the following terms:

> After twenty pages of somniferous type telling the recent history of the world, it reaches its first incendiary passage: "Strikes are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the strike-workers trying to usurp functions of municipal government as in Seattle, and Winnipeg. The mass struggle of the proletariat is coming into being."

As to the effects of Gitlow's "Manifesto," Chafee wrote: "Any agitator who read these thirty-four pages to a mob would not stir them to violence, except possibly against himself. This Manifesto would disperse them faster than the Riot Act."[15]

New York's Attorney General, quoting from Shorey's Commentaries, brought before the Supreme Court still another comparison, an analogue of "poisons": ". . . the disseminating or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man may be allowed to keep poisons in his closet, but not publicly to vend them as cordials."[16] The analogy is invalid on several grounds, the most apparent one being that deception and death are elements of the "publicly sell poisons as cordials" analogue and not of Gitlow's anti-capitalist, anti-government "Manifesto." But once Gitlow's "bad sentiments" were indentified with "poisons" that are developed, produced, and distributed for the sole purpose of killing, the conclusion was clear: such poisonous speech could not be given First Amendment protection.

When Gitlow was decided by the United States Supreme Court, Holmes inserted into his dissenting opinion still another metaphor which, once accepted, would lead more readily to giving Gitlow's speech constitutional protection than the "spark," "fire," "flame," "snake," and "poison" metaphors and analogues. Holmes said in his dissenting opinion:"Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth." The birth metaphor carries with it the sense of development over a period of time: conception, gradual growth, birth. The birth metaphor could not have been used by the Gitlow majority since it does not carry with it the implication of the danger and imminence of a "sweeping and destructive conflagration." In effect, Holmes and Brandeis were rejecting the majority's "revolutionary spark" metaphor in Gitlow.

In Abrams v. United States, another classic free speech case decided the same year as Schenck, the majority of the Court upheld the convictions of five anarchists and socialists who had been charged with, among other things, conspiring to publish and distribute circulars that contained language "intended to bring the form of Government of the United States into contempt, scorn, contumely and disrespect" and "disloyal scurrilous and abusive language about the form of the Government of the United States."[17] Quoting from material appearing in Abrams' circulars, the Court majority noted that President Wilson had been denounced as a hypocrite and a coward and that "growing more inflammatory as it proceeds, the circular culminates in: 'The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine! Yes! Friends, there is only one enemy of the workers of the world and that is CAPITALISM!' The majority found in Abrams' circulars "threats of armed rebellion," circulars which had as their purpose to bring "upon the country the paralysis of a general strike," "to throw the country into a state of revolution," to "excite . . . disaffection, sedition, riots, and revolution." Obviously any circular identified with the words "inflammatory," "rebellion," "sedition," "riots," and "revolution" is not going to get First Amendment protection.

Where the majority saw violence, destruction and rebellion, Holmes and Brandeis saw the "surreptitious printing of a silly leaflet by an unknown man." In his dissenting opinion Holmes used a now widely accepted metaphor. In his classic dissent Holmes said:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by the free trade of ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

As Holmes saw it, the American public "market" was an appropriate place for Abrams to present his ideas through what Holmes considered "a silly leaflet by an unknown man," the publication of which presented no clear and present danger. In effect, Abrams' circular was just one more of the many goods exposed for sale "in the free trade of ideas" in the "competition of the market."

There is hardly any way that this metaphor could have found its way into the majority opinion for the "market" was the place for trading, buying and selling. There is nothing in the majority opinion to indicate that the Justices viewed Abrams and his co-conspirators as buyers and sellers of anything that belonged in the marketplace. In fact, as the majority would see it, the "inflammatory" words were used with the intent to burn down the market. Once Holmes threw Abrams' circulars into the marketplace, the "speech" was destined to warrant First Amendment protection as far as Holmes and Brandeis were concerned. Similarly, once the majority indentified the circulars as "inflammatory" Abrams' "speech" was destined to be denied First Amendment protection.

IV

When attorneys and Supreme Court Justices metaphorized "revolutionary" ideas into "flames," "fire," "sparks," and "poisons," and those advocating such ideas as "snakes," our thinking indeed "is directed, not by the force of argument at hand, but by the interest of the image in our mind." The metaphors and analogues stand out, attract our attention, make an impression, which after all is what metaphors are supposed to do. Landau's warning, cited at the outset of this essay, that while we speak and write in metaphors, "the consequence may be more than felicity of phrase . . ., it can also be the source of distortion and misrepresentation"--that warning becomes especially relevant when we see distorting metaphors and analogues, posing as part of argument, appearing in court opinions denying First Amendment protection to the severe critics, dissenters, and unorthodox in our society.

Endnotes

[1]Berky v. Third Ave. Ry. Co., 155 N.E. 58 (1926).

[2]George Eliot, Middlemarch (Boston: Houghton Mifflin, 1956), p. 63.

[3]McCollum v. Bd. of Education, 333 U.S. 203 (1948).

[4]Ibid.

[5]Ibid.

[6]Engel v. Vitale, 370 U.S. 421 (1962).

[7]Martin Landau, "On the Use of Metaphor in Political Analysis," Social Research, 28 (Autumn 1961), 331.

[8]Monroe Beardsley, Thinking Straight (Englewood Cliffs, N.J.: Prentice Hall, 1956), p. 245.

[9]Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919).

[10]Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927).

[11]Schenck v. United States, 249 U.S. 47 (1919).

[12]Frohwerk v. United States, 249 U.S. 204 (1919).

[13]Gitlow v. New York, 268 U.S. 652 (1925).

[14]Brief for Defendant-in-Error, p. 26, Gitlow v. New York 268 U.S. 652 (1925).

[15]Zachariah Chafee, Jr., Free Speech in the United States (New York: Antheneum, 1969), pp. 318-319.

[16]Memorandum of Attorney General of the State of New York in Opposition to Application for Writ of Error, p. 4, Gitlow v. New York, 268 U.S. 652 (1925).

[17]Abrams v. United States, 250 U.S. 616 (1919).

NB: An earlier version of this study was presented at the 1980 Convention of the Western Speech Communication Association.

THE RHETORIC OF LEGAL REALISM: WILLIAM O. DOUGLAS ON THE FIRST AMENDMENT

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When a justice has been characterized as "the supreme expositor from the bench of the philosophy of legal realism,"[1] small surprise should result if scholars look to that justice's opinions for an index of that particular strain of singularly American jurisprudence. Such has been true in the case of Justice William O. Douglas, about whom the statement was made.[2] However, until recently no one has investigated the rhetorical implications of such a characterization--is there a rhetoric of legal realism? What might it look like? What might be its generic constituents? Indeed, do those generic constituents exist? This paper reports an investigation[3] which led to the conclusion that the First Amendment opinions of Justice Douglas provide evidence for the possible existence of a rhetorical genre grounded in the jurisprudence known broadly as legal realism. This paper begins with an overview of the philosophy of legal realism which leads to a hypothetical operational definition of a legal realist rhetorical genre. An examination of actual opinions follows, using that definition as a theoretic guide.

Argument from Context: The Legal Realist Warrant

Addressing the New York State Bar Association in 1932, Justice Benjamin N. Cardozo claimed that "the most distinctive product of the last decade in the field of jurisprudence is the rise of a group of scholars styling themselves realists."[4] The realists to whom Cardozo referred were in fact both scholars and jurists.[5] The scholars providing seminal philosophical impetus for the movement were William James and John Dewey, the fathers of pragmatism. The central jurist was Oliver Wendell Holmes, Jr., whose chief interpreter, Dean Roscoe Pound of the Harvard Law School, was primarily responsible for initiating the corollary to legal realism, "sociological jurisprudence." Wilfred E. Rumble thus argued that the realist movement was "best understood as an outgrowth of pragmatism, sociological jurisprudence, and the ideas of Mr. Justice Holmes."[6]

Although the term "sociological jurisprudence" is sometimes subsumed by the term "legal realism" and sometimes used synonomously, a clearer understanding of them reveals that the former refers to the study of legal institutions from a certain perspective, while the latter refers to a certain view of their operation. Ronald Dworkin explained the first:

> The emphasis on facts developed into what Roscoe Pound of Harvard called sociological jurisprudence; he meant the careful study of legal institutions as social processes, which treats a judge, for example, not as an oracle of doctrine, but as a man responding to various sorts of social and personal stimuli.[7]

A radical shift of focus was implied in this view, one that no longer viewed jurisprudence as a closed logical system but rather as functional institutions with social causes and effects to be reckoned with. Thus in an essay entitled "The Need for a Sociological Jurisprudence," Dean Pound called for "scientific apprehension of the relations of law to society and of the needs and interests and opinions of society today."[8]

The extension of this view made by the realists focused upon the operation of legal institutions and jural agents and was similarly radical in departing from traditional views of the judicial decision-making process. The

impact of William James' psychology was most significant here. Harry Jones suggested that the realist concept of legal thinking was best characterized as,

> . . . a shared legacy from Holmes--that judges prosecutors, and practicing lawyers do not really think in syllogisms, that substantive doctrine is not the essence of law, and that one who would know the ways of legal action must dig beneath the doctrines formally announced in judicial opinions down into the substrata of personal preference, empirical fact, and conflicting social interests.[9]

Known both as "rule skepticism" and "fact-skepticism," this view of the decision-making process received its most sophisticated development in the work of Jerome Frank. The arguments judges use in announcing their decisions are better understood when viewed as Judge Frank viewed them:

> Rules, whether stated by judges or others, whether in statutes, opinions, or text-books by learned authors, are not the Law, but are only some among many of the sources to which judges go in making the law of the cases tried before them. . . The law, therefore, consists of decisions, not of rules. If so, then, whenever a judge decides a case he is making law.[10]

Frank's explanation is clearly the progeny of Holmes' famous definition of law itself: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[11]

The important conclusion to be drawn from this discussion of judges as the centerpiece of legal realism is that their decisions provide the realist with criteria for determining the validity of laws. Whereas the proponents of natural law seek adherence to a moral order as the sine qua non of validity and the positivists insist upon a law's inclusion in a valid legal system, the realists' ultimate criterion is social utility. A legal rule, either in the form of a judge's decision or a statute, would be required to meet two standards: (1) Does the rule aspire to desirable social goals? and, (2) Does the rule provide a rational basis for achieving those goals through the argument it presents or implies? Of course no realist would argue that pedigree is unnecessary for a law, but such legitimation by virtue of harmony with the rules for rule-making would be seen as ancillary to its capacity for social engineering.[12]

From these perspectives on legal realism can now be extracted the operational definition of a potential rhetorical genre of judicial opinion herein called Argument from Context: Arguments drawing warrants from legal realism, while possibly referring to statutory or case-law rules, in fact rely upon reference to social goals for support and typically stress the exigencies of the instant case or extra-judicial evidentiary materials.

The analog to Argument from Context found in rhetorical theory was explained by Richard Weaver as "Argument from Circumstance," which he characterized as "the nearest of all arguments to purest expediency. This argument merely reads the circumstances. . . and accepts them as coercive, or allows them to dictate the decision." Weaver went on to suggest that such "argument savors of urgency rather than of perspicacity; and it seems to be preferred by those who are easily impressed by existing tangibles."[13]

The underlying teleological nature of legal realism (which is inherited from sociological jurisprudence), when viewed in tandem with Weaver's explanation of Argument from Circumstance, may provide clues with which to seek an "internal dynamic"[14] in judicial opinions in order to determine whether such elements form a rhetorical genre.

Application

An examination of 207 of William O. Douglas' First Amendment opinions found that seventy-two appeared to rely predominantly upon the tenets of legal realism as operationalized in this study. A closer analysis revealed three distinct sub-species of the "Argument from Context." They were characterized as the "sociocentric," the "relativistic," and the "exigential" forms of the "Argument from Context."

Argument from Context: The Sociocentric Sub-Species

Sociocentric Arguments from Context were decided predominantly by reference to social goals and/or social effects. These arguments came closest to typifying a sociological jurisprudence--the view that legal institutions are best understood as being socially embedded, reacting to and impacting upon the society around them. This court-centered view features judges as its focal point and expects them to argue from a desire to achieve social goals or an intent to produce or prevent social effects. Douglas' First Amendment opinions provide a rich inventory of such rhetoric.

The cold war mentality of the 1950s gave rise to a plethora of governmental committees charged with insuring the loyalty of public employees. Tenney v. Bandhove came to the court in 1951 from California, testing the question of whether the privileges and immunities afforded state legislators extended to the investigative function of committees. The majority held that the First Amendment granted immunity for such functions, and Douglas dissented. He did not entirely reject the need for immunity, but was clearly motivated in this argument by concern with the social pressures that spawned such committees and by dismay with the social effects they were capable of producing:

> . . . we are apparently holding today that the action of those committees have no limits in the eyes of the law. May they depart with impunity from their legislative functions, sit as kangaroo courts, and try men for their loyalty and their political beliefs? May they substitute trial before committees for trial before juries? May they sit as a board of censors over industry, prepare their blacklists of citizens and issue pronouncements as devastating as any bill of attainder?[15]

What emerged rather clearly in Douglas' Tenney dissent was the sociological view of legal institutions, in this case of both the legislatures and the courts. He recognized the social impact of the investigative arm of the state legislature and sought to curb its undesirable effects with the judiciary's power of review.

In the 1950s schools and teachers were a popular target for those wanting to safeguard Americanism. To this end New York passed the "Feinberg Law" aimed at purging "subversive persons from the public school system." The Supreme Court sustained the law; again Douglas dissented, this time producing one of the more stirring opinions of his career:

> What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. A "party line"--as dangerous as the "party line" of the Communists lays hold. It is the "party line" of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear

> stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipeline for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become servile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.[16]

When de Tocqueville suggested in the nineteenth century that virtually every problem in American life eventually found its way to the Supreme Court, even he probably would not have guessed that his observation would hold true for the most intimate problems of the bedroom. Yet that is precisely what Poe v. Ullman brought to the Court in 1961, testing the right of a husband and wife to receive from their doctor information regarding birth control. In this case the Court sustained lower court rulings which Douglas' dissent argued would have the effect of "sealing the lips of a doctor because he desires to observe the law, obnoxious as the law may be."[17] Such a result, he argued, culminated in social effects that were unacceptable:

> The regime of a free society needs room for vast experimentation. Crises, emergencies, experience at the individual and community levels produce new insights; problems never imagined, appear. To stop experimentation and the testing of new decrees and controls is to deprive society of a needed versatility.[18]

What is evident in these two cases is Douglas' reliance upon the Sciocentric Argument from Context in order to alleviate or produce certain social effects; in one case in the area of state government, in the other in the area of medicine. Six years later his own profession was drawn in by this argument.

The emergence of poverty law centers in the 1960s was among the more pragmatic results of the civil rights struggle. But when Hackin v. Arizona came before the Supreme Court in 1967 testing the extent to which the indigent were entitled to counsel, the Court, per curiam, dismissed the appeal for want of a federal question. Douglas dissented. In two ways his opinion in Hackin illustrated how a judicial argument may find its warrant in the philosophy of legal realism. First, he stressed the interplay between the legal profession and the society it serves:

> . . . to millions of Americans who are indigent and ignorant--these rights [that lawsuits are protected speech under the first amendment, see N.A.A.C.P. v. Button, 371 U.S. 415 (1963)] are meaningless. They are helpless to assert their rights under the law without assistance. They suffer discrimination in housing and employment, are victimized by shady consumer sales practices, evicted from their homes at the whim of the landlord, denied welfare payments and endure domestic strife without hope of the legal remedies of divorce, maintenance, or child custody decrees.[19]

Second, in the style of the "Brandeis Brief"[20] named for his philosophical and chronological progenitor, Douglas footnoted the above passage with citations, not to legal precedents, but to ten major sociological studies of poverty and the law. Such reliance upon extra-judicial sources is a product of the twentieth century almost exclusively, and of legal realists typically. The Sociocentric Argument from Context may have reached its zenith in Chief Justice Earl Warren's majority opinion in Brown v. Board of Education,[21] an opinion that relied heavily upon studies by the prominent black social psychologist, Dr. Kenneth Clark.[22] Douglas, however, was never more forceful than when making such arguments, and diverse areas of American society came under his scrutiny as he relied upon them. Two final examples should suffice.

In 1972 Healey v. James brought to the Court the question of whether a state college president could constitutionally deny recognition to a proposed chapter of Students for a Democratic Society (SDS) on his campus. Justice Powell's majority opinion ruled that he could not, and Douglas concurred. The warrant from which Douglas argued though was not rule-based, but sociocentric, stressing goals to which the good society should aspire:

> The present case is miniscule in the events of the '60s and '70s. But the fact that it has come here for ultimate resolution indicates the sickness of our academic world, measured by First Amendment standards. Students as well as faculty are entitled to credentials in their search for truth. If we are to become an integrated, adult society, rather than a stubborn status quo opposed to change, students and faculties should have communal interests in which each age learns from the other. Without ferment of one kind or another, a college or university (like a federal agency or other human institution) becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion.[23]

No doubt the single most important Supreme Court case affecting mass media in America was Red Lion Broadcasting Co. v. FCC, which gave constitutional sanction to the Fairness Doctrine.[24] Much to the dismay of many students of the Court, Douglas took no part in the Red Lion decision. However, four years later he had his opportunity to speak to the wisdom of the Fairness Doctrine and in doing so he authored what was his last great First Amendment opinion. The case was Columbia Broadcasting System v. Democratic National Committee, and in it the Court ruled that the Fairness Doctrine did not require individual licensees to sell commercial time for the purpose of editorial announcements. Two groups, the DNC and the Business Executives Move for Peace had taken a Washington radio station, WTOP, to court in their attempt to broadcast anti-war editorials. The Court of Appeals ruled in favor of the two groups, invoking the Fairness Doctrine. But the Supreme Court, by a 7-2 vote, reversed, Chief Justice Burger's opinion saying, in part, "editing is what editors are for." Douglas took this opportunity to say what he had been unable to say in Red Lion. Concurring with the majority, he argued from the Sociocentric Argument from Context that governmental intrusion into the television industry would provoke undesirable effects:

> Red Lion Broadcasting Co. v. FCC, . . . in a carefully written opinion that was built upon predecessor cases, put TV and radio under a different regime [from newspapers]. I did not participate in that decision, and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV and radio in order to serve its sordid or benevolent ends. In 1973--as in other years--there is clamoring to make TV and radio emit messages that console certain groups.[25]

The prospect of government compelled speech--forcing broadcasters to "emit messages"--was one Douglas feared and one which remains at the center of debate on the social utility of the Fairness Doctrine.

Argument from Contest: The Relativistic Sub-Species

A second sub-species of the Argument from Context finds its roots in the rule and fact skepticism of Jerome Frank.[26] Recognizing the inescapable variability of human judgment, the skeptics argued that the law "consists of decisions, not of rules,"[27] with the upshot being that there are some areas of conduct in which courts should not be making decisions. Thus, the sub-species of argument based upon this aspect of legal realism may be called the "Relativistic" Argument from Context. Douglas' opinions in the area of obscenity and pornography

relied heavily upon this type of argument, one which basically denies the possibility of making aesthetic judgments capable of winning universal support, and therefore concludes that such decisions are no business of judges and juries.

An early statement of this position came in Douglas' opinion for the Court in Hannegan v. Esquire in 1946. Postmaster General Hannegan had revoked the second class mailing privileges of Esquire magazine upon a finding that the periodical failed to meet one condition of Section 14 of the Classification Act of 1879, stipulating that publications entitled to the lower rate must contain "information of a public character" and thus contribute to the public good. The Court vacated Postmaster General Hannegan's order, and Douglas argued from the Relativistic Argument from Context that in passing the legislation Congress never intended,

> . . . that each applicant for the second class rate must convice the Postmaster General that his publication positively contributes to the public good or public welfare. Under our system of government there is an accomodation for the widest variety of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There would doubtless be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus and Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic [idea] implicit in the requirements of the fourth condition can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to me to be trash may have for others fleeting or even enduring values.[28]

The 1957 term of the Supreme Court saw a number of obscenity cases from various parts of the country. In Kingsley Books v. Brown Douglas posted a dissent which foreshadowed his dissent sixteen years later in Miller v. California. The epistemological and aesthetic relativism characteristic of legal realism was clearly stated here as Douglas observed that,

> Juries or judges may differ in their opinions, community by community, case by case . . . Free speech is not to be regulated like diseased cattle or impure butter. The audience (in this case the judge or jury) that hissed yesterday may applaud today, even for the same performance.[29]

In Ginzburg v. United States in 1966 the Court continued the process begun nine years earlier in Roth of attempting to formulate objective tests for the judicial determination of obscenity. Here Ralph Ginzburg was charged with obscenity as manifested in three of his publications: Eros and Liason magazines, and a monograph entitled The Housewife's Handbook on Selective Promiscuity. The final aspect of the "Roth Test Revised" was added in this case, the so-called "pandering" element. The Court reached its finding of obscenity, in part at least, because Ginzburg, who had attempted to obtain mailing privileges in the towns of Blue Ball and Intercourse, Pennsylvania, and Middlesex, New Jersey, was found guilty of possssing "the leer of the sensualist." As Professor Emerson pointed out, Douglas' dissent "stressed the elusiveness of all the standards which have been proposed."[30] The opinion, perhaps the clearest example of the Relativistic Argument from Context, began with a citation from Jerome Frank's circuit court opinion in the Roth case and then proceeded to posit a number of unanswerable questions typical of rule and fact skepticism:

> How can we know enough to probe the mysteries of the subconscious of our people and say that this is good for them and that is not? Catering to the most eccentric taste may have some "social importance" in giving that minority an opportunity to express itself rather than to repress its inner desires . . . How can we know that this expression may not prevent antisocial conduct?[31]

Argument from Context: The Exigential Sub-Species

A third sub-species of the Argument from Context emerged in Douglas' First Amendment opinions. This type might be called the "Exigential," for it allows the decision to be dictated primarily by the pecularities of the instant case. Karl Llewellyn's article, "Some Realism About Realism" in the 1922 Harvard Law Review, provided insight into this type of argument when he wrote that the realists,

> . . . want law to deal . . . with things, with people with tangibles, with definite tangibles, and with observable relations between tangibles--not with words alone; when law deals with words, they want words to represent tangibles which can be got at beneath words and observable relations between those tangibles.[32]

This, of course, was not to suggest that the legal realist wanted law to become a disconnected sequence of ad hoc decisions, with no memory of precedent cases and no reference to generalized legal rules. It simply meant that on occasion, the "tangibles" would provide the point of departure from whence the judge reasons to the rule, instead of vice versa, and as Douglas pointed out in E.P.A. v. Mink, "the starting point of a decision usually indicates the result."[33] Again, this argument type is differentiated from rule-based arguments in terms of rhetorical emphasis, not on the basis of the total absence of reference to cases or statutes.

Douglas invoked this argument form in 1947 in the case of Craig v. Harney when he pointed out that often the Supreme Court is required to make "an independent examination of the facts."[34] The facts requiring such an independent examination in this case related to a series of editorials rather vigorously attacking a judge in a local trial in Texas. The papers were charged with contempt, were convicted, and then appealed to the Supreme Court where, through Douglas' majority opinion, their convictions were reversed. Looking to the content of the editorials and their probable impact upon the judge's impartiality, Douglas wrote:

> . . . it takes more imagination than we possess to find in this sketchy and one-sided report of a case any imminent or serious threat to a judge of reasonable fortitude . . . We agree with the court below that the editorial must be appraised in the setting of the news articles which both preceded and followed it. It must also be appraised in light of the community environment which prevailed at that time.[35]

The rule to which this analysis of the "tangibles" was intended to refer was the "clear and present danger test," but this argument was distinct from rule-based arguments for it clearly emphasized the facts of the case and not the rule itself.

A similar result was reached in Douglas' oft-quoted dissent in Dennis v. United States, one of the leading Communist conspiracy cases of the 1950s. In Dennis the Court sustained the convictions of eleven members of the Central Committee of the Communist Party of the United States for violating the membership clause of the Smith Act. Addressing himself to the notion of advocacy of abstract doctrine, Douglas asserted that "how it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. . . . In America they [Communists] are miserable merchants of unwanted ideas;

their wares remain unsold."[36] In the absence of evidence on the record that such advocacy would in fact result in the overthrow of our system of government. Douglas argued, the First Amendment afforded protection to the defendants. Thus, the Exigential Argument from Context may be seen to rely upon factual evidence, or the lack of it, when such evidence is deemed relevant to the decision. Reference to a legal rule is often the result of such an argument but is not the basis of it.

A final example of how Douglas argued from the exigencies of the instant case to a rule, with emphasis upon the former, also arose in the context of what Emerson called "the post-war hysteria known as McCarthyism."[37] The Court denied certiorari in Black v. Cutter Labs, a case involving the dismissal of an employee on the grounds that she was a security risk. Douglas argued that the case should be heard, and his opinion relied predominantly upon the Exigential Argument from Context:

> Cutter Laboratories is an important pharmaceutical factory. It may need special protection. It may need to establish safeguards against sabotage and adulteration. It may need special screening of its employees. But there is not a word in the present record indicating that it needs protection against Doris Walker. She has no criminal record, she is guilty of no adulteration, no act of sabotage. The factory in question has not been plagued with any such problem. It is only the fear that Doris Walker might at a future time engage in sabotage that is made the excuse for her discharge. I do not think that we can hold consistently with our Bill of Rights that Communists can be be proscribed from making a living on the assumption that whereever they work the incidence of sabotage rises or that the danger from Communist employees is too great for critical industry to bear. The blunt truth is that Doris Walker is not discharged for misconduct but either because of her legitimate labor activities or because of her political ideology or belief. Belief cannot be penalized consistently with the First Amendment.[38]

The dominant theme of this opinion was thus an analysis of the factual situation--the tangibles--which then led to a generalized rule, in this case the First Amendment.

An inductive internal dynamic thus typifies the Argument from Context in each of its sub-species. In the first sub-species, the Sociocentric, an inductive progression underlies the argument--specific social situations, social contexts, social goals as manifested in specific cases lead to but do not rely upon generalizations taking the form of common law, statutory, or constitutional rules. The Relativistic sub-species of the Argument from Context also uses inductive processes but with a different result. Here the judge-rhetor reads the contrariety of situations, the aesthetic and/or epistemological variability inherent in value judgments, and reasons to the rule that there can be no rule to accomodate such disparate situations. Finally, the Exigential Argument from Context is based upon factual phenomena and views them as controlling. The judge proceeds from such facts to a rule, and that sequence of the argument distinguishes it from positivistic (i.e., syllogistic) arguments.

Rhetorical Genres in Judicial Opinion

That rhetorical genres exist in judicial opinion in the form of Argument from Context seems evident. The first qualification of this claim, of course, flows from the limitations of case study. To infer from one justice, particularly one like Douglas, to all others is questionable. But two central issues must be kept in mind. First, case studies are not designed to provide final answers, only initial clues. The clues here are strong. Second, although Douglas is clearly an unrepresentative case, the same can be said of any justice who ever

served--there is no "typical" Supreme Court justice. But they do all serve the same institution and a legal system with certain endemic characteristics, and to that extent any justice, no matter how atypical he may appear, can provide some insight into the nature of the system he serves.

A second general qualification of the generic claim made here has to do with the nature of the exigencies to which Douglas was responding. All the evidence offered herein is based upon rhetorical responses to First Amendment exigencies. One aspect of this disclaimer is that these issues were perhaps more personally salient to Douglas than to other justices, a consideration that could color the results of an analysis such as this. Another aspect of this disclaimer is that despite the fact that an analysis of only First Amendment opinions achieves more precision than other studies have, it is still quite a broad brush with which to paint. First Amendment law divides into speech, press, assembly, establishment, exercise, and petition clauses, each of which may possibly inspire different responses because of the vastly different exigencies which may typify them. The present study made no distinction on the basis of these different areas of law. However, there is a thread running through these diverse elements of the First Amendment that justifies treating them together. The "personal fulfillment" dimension of the First Amendment, as Emerson put it,[39] cuts across all these areas of law in Douglas' approach. Whether the instant case arose from controversies involving sidewalk oratory, religious pamphleteering, or labor union organizing, Douglas saw the situations as kin: They all represented individual citizens striving through expression to gain a measure of dignity, to improve their lives, to spread the truth as they saw it. Thus, although the First Amendment's penumbra covers a variety of rights, we are warranted in treating them as a sufficiently similar class of exigencies for purposes of genre criticism.

One central implication of the existence of rhetorical genres based upon legal philosophy inhering in judicial opinion seems apparent: Jurisprudence should not be a means of labeling a justice, but rather a means of classifying his arguments. Just because Douglas issued numerous opinions aimed at engineering social goals, that alone does not place him in the camp of the legal realists.[40] Philosophical variations in judicial opinions may be best understood as variant rhetorical responses to variant legal situations--a jurisprudential set of topoi--to which the judge-rhetor may refer. They are "the available means of persuasion in any given case," not a mold from which the judge may never escape. By understanding jurisprudence in a rhetorical light, we probably can better evaluate the judge, his arguments, and the legal philosophy as well.

Endnotes

[1]Michael I. Sovern, "Mr. Justice Douglas," Columbia Law Review 74 (1974), 234.

[2]See for example, Gerhard Casper, "The Liberal Faith: Some Observations on the Legal Philosophy of Mr. Justice William O. Douglas," Federal Bar Journal 22 (1962), 179-194; Leon D. Epstein, "Justice Douglas and Civil Liberties," Wisconsin Law Journal 125 (1951), 125-157; Kenneth L. Karst, "Invidious Discrimination: Justice Douglas and the Return of the 'Natural-Law-Due-Process' Formula," U.C.L.A. Law Review 16 (1969), 716-750; L.A. Powe, Jr., "Evolution to Absolutism: Justice Douglas and the First Amendment," Columbia Law Review 74 (1974), 371-411; Dorothy Bruckton James, "Judicial Philosophy and Accession to the Court: The Cases of Justices Jackson and Douglas," Unpublished Ph.D. Dissertation, Columbia University, 1966; Roy Lee Meek, "Justices Douglas and Black: Political Liberalism and Judicial Activism," Unpublished Ph.D. Dissertation, University of Oregon, 1964; and Solomon Resnik, "Black and Douglas: Variations in Dissent," Unpublished Ph.D. Dissertation, New School for Social Research, 1970; William O. Douglas, The Court Years (New York: Random House, 1980); Haig Bosmajian, Justice Douglas and Freedom of Speech (Metuchen, N.J.: Scarecrow Press, Inc., 1980); James Simon, Independent Journey: The Life of William O. Douglas (New York: Harper & Row, 1980).

[3]This paper is based in part on the author's doctoral dissertation, directed by Dr. Paul Barefield, "Justice William O. Douglas on the First Amendment: Rhetorical Genres in Judicial Opinions," Unpublished Ph.D. Dissertation, University of Oklahoma, 1979.

[4]"Jurisprudence," in Margaret E. Hall, ed., Selected Writings of Benjamin Nathan Cardozo (New York: Falon Publications, 1947), p. 10.

[5]The term draws in a variety of writers. Harry Jones explains that he "shall be using the tent term 'legal realist' in a sense broad enough to accomodate the behavioral focus of Karl Llewellyn, the fact-skepticism of Jerome Frank, the institutional empiricism of Underhill Moore and the logical pragmatism of Edwin Patterson." (Harry H. Jones, "Legal Realism and Natural Law," in M.P. Golding, ed., The Nature of Law [New York: Random House, 1966], p. 263). Ronald Dworkin refers to "the powerful intellectual movement called 'legal realism,'" and associates with it the names of John Chipman Gray, Oliver Wendell Holmes, Jr., Jerome Frank, Karl Llewellyn, Roscoe Pound, and Morris and Felix Cohen (Taking Rights Seriously, [London: Duckworth, 1977], pp. 3-4). Neither writer would claim comprehensiveness for his list; perhaps the work of Wilfred E. Rumble, Jr., American Legal Realism: Skepticism, Reform, and the Judicial Process (Ithaca, NY: Cornell University Press, 1969) does the best job of identifying both the representative contributors and significant ideas of the realist tradition.

[6]Rumble, p. 46.

[7]Dworkin, Taking Rights Seriously, p. 4.

[8]Green Bag XIX (1907), 610-600, quoted in Rumble, p. 9.

[9]Jones, p. 263.

[10]Jerome Frank, Law and the Modern Mind (New York: Anchor Books, 1963), pp. 137-138.

[11]Holmes, "The Path of the Law," Harvard Law Review 10 (1897), 457-468, quoted in Golding, The Nature of Law, p. 179.

[12]In an important article in The Journal of Philosophy Ronald Dworkin detailed exactly what forces are at work when a judge bases his decision upon factors other than statute or precedent. Pointing out that the belief that judges always "find law" is a tenet of the outmoded school of thought called "formalism" or "mechanical jurisprudence," Dworkin explained that "the position presently in vogue insists rather that there are two sources of judicial decision: rule and discretion." Dworkin, who insisted that the exercise of discretion is not "an occasional misfiring but a characteristic feature of the legal process," suggested that there are basically three types of standards available to the judge as legitimate inventional options when arguing from sources other than statute or precedent:

> First, there are standards, like "no man shall profit by his own wrong" and "Infants are the wards of the law," which are like textbook rules in that they have already been used in a variety of cases as good reasons for decision, and a judge will determine the weight and scope of such standards by awareness of these cases.
>
> Second, certain institutions of any community are competent to declare standards on its behalf. For us, today, such institutions include legislatures, executive officers, and administrative agencies, and the judiciary itself, in the sense that a "new" standard may be known to represent a proper summary of the

resolution of other standards achieved in other cases.

> Third, judgments of the community at large or some identifiable segment thereof. The court refers to such judgments when it rejects a particular result or rule as unjust, as well as when it more explicitly invokes the ideals of the society. . . This discussion treads on the famous controversy . . . about the relation of law and morals. On some occasions, in some kinds of cases, moral principles accepted as standards within the community will figure as good reasons for a legal decision, just as, on other occasions, in other kinds of cases, will standards otherwise established.

Ronald Dworkin, "Judicial Discretion," The Journal of Philosophy 60 (1963), 624-638.

In Dworkin's argument lies the key to understanding Jones' (see Note #5 above) suggestion that close affinities exist between natural law and legal realism. The point at which they intersect is the point at which they depart from an argument from rule in order to make discretionary decisions and thereby fill the so-called "gaps" in the positive law. The realist adopts a more empirical orientation, the natural lawyer tends to the idealistic. Arthur Goodhart explained the empirical basis of such a realist orientation:

> It is by his choice of material facts that the judge creates law. A congeries of facts is presented to him; he chooses those which he considers material ones. . . His conclusion is based on the material facts as he sees them, and we cannot add or subtract from them by proving that other facts existed in the case.

Arthur Goodhart, "Determining the Ratio Decidendi of a Case," Yale Law Journal XL (December 1930), p. 169.

Abraham L. Davis provided numerous examples of such fact selection in his important work, The United States Supreme Court and the Uses of Social Science Data (New York: MSS Information Corporation, 1973). A notable case was the apparent influence upon Chief Justice Earl Warren's Brown opinion of extensive social psychological evidence relating the harms of racial segregation.

[13]R. M. Weaver, The Ethics of Rhetoric, (Chicago: Henry Regnery Co., 1953). p. 57. Some legal theorists of a positivistic bent would agree with Weaver's suggestion that those adopting this form of argument are less than perspicacious, particularly as regards analysis of statutory and/or caselaw constraints. However, that misses the point of American legal realism; it was astute social perspicacity that sired the urgency of their arguments in favor of making precedents rather than following them.

[14]Space obviously precludes detailed extrapolation of genre theory. Let it suffice to say that the present study adopted the guidelines and principles of Campbell and Jamieson in Form and Genre: Shaping Rhetorical Action (Falls Church, VA: The Speech Communication Association, 1978). They explained just what the critic seeks when pursuing, in Northrop Frye's word, "clarification." The aim is to find the "internal dynamic" that binds together constellations of substantive and stylistic forms. Thus, when the critic purports to have found a rhetorical genre, the claim is being made that "a group of discourses has a synthetic core in which certain significant rhetorical elements, e.g., a system of belief, lines of argument, stylistic choices, and the perception of the situation, are fused into an indivisible whole." (p. 21)

[15]341 U.S. 367 (1951) at 382.

[16]Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952) at 510.

[17]367 U.S. 497 (1961) at 514-515.

[18]367 U.S. 497 (1961) at 518. This case was overruled by Griswold v. Connecticut, 381 U.S. 479 (1965), a case in which Douglas wrote the Courts' opinion and cited this dissent for support.

[19]389 U.S. 143 (1967) at 145.

[20]The "Brandeis Brief" is a term of describing an approach to legal argumentation first introduced by Attorney Louis D. Brandeis when he argued Muller v. Oregon, 208 U.S. 412 (1908) before the Supreme Court. Johnson wrote that the "Brandeis Brief" introduced a "new technique in the weighing of constitutional issues. This occured when Mr. Louis D. Brandeis handed the Court . . . his famous brief, three pages of which were devoted to a statement of the constitutional principles involved and 113 pages of which were devoted to the presentation of facts and statistics, backed by scientific authorities, to show the evil effects of too long hours on women, 'the mothers of the race'." Johnson, Social Planning Under the Constitution, 2 Selected Essays (1938) 131, 145. Quoted in Edward L. Barrett, Jr., and Paul W. Bruton, eds., Constitutional Law: Cases and Materials, (Mineola, New York: The Foundation Press, Inc., 1973) p.700.

[21]347 U.S. 483 (1954).

[22]See generally: Archibald Cox, The Warren Court: Constitutional Decisions as an Instrument of Social Reform (Cambridge: Harvard University Press, 1968): Abraham Davis, The United States Supreme Court and the Uses of Social Science Data (New York: MSS Information Service, 1973); and Paul L. Rosen, The Supreme Court and Social Science (Urbana: University of Illinois Press, 1972).

[23]408 U.S. 169 (1972) at 107.

[24]395 U.S. 367 (1969). For copious background information on the Red Lion case and other significant legal developments in broadcast regulation, see Fred W. Friendly's excellent work, The Good Guys, The Bad Guys and the First Amendment (New York: Random House, 1975).

[25]412 U.S. 94 (1973) at 154-155.

[26]Jerome Frank, Law and the Modern Mind (New York: Anchor Books, 1963) originally published by Brentano's 1930.

[27]Ibid., p. 138.

[28]327 U.S. 157 (1946) at 157-158.

[29]354 U.S. 436 (1957) at 443.

[30]Thomas I. Emerson, David Haber, and Norman Dorsen, Political and Civil Rights in the United States, Student Edition, Vol. I (Boston: Little, Brown and Company, 1967), p. 656.

[31]383 U.S. 463 (1966) at 491.

[32]Karl Llewellyn, "Some Realism About Realism," Harvard Law Review 44 (1922), 1223.

[33]410 U.S. 73 (1973) at 105.

[34]331 U.S. 367 (1947) at 373.

[35]Ibid., at 375-376.

[36]341 U.S. 494 (1951) at 588-589.

[37]Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage Books, 1970) p. 112.

[38]351 U.S. 292 (1956) at 302-303.

[39]Thomas I. Emerson, "Justice Douglas' Contribution to the Law: The First Amendment," Columbia Law Review 74 (1974), 356. In fact, the study upon which this essay is based found quite the contrary to be true. In his 207 first amendment opinions, Douglas relied most often (117 or 56.5% of the cases) upon arguments grounded in legal positivism. The 72 legal realist opinions accounted for 34.8% of his first amendment opinions, while natural law arguments numbered 18 or 8.7%.

NO ON PROPOSITION 6: THE SAN FRANCISCO CAMPAIGN

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"If you look like a duck and walk like a duck . . . you are a duck." John Briggs

"Anita Bryant is to Christianity what paint by the numbers is to art."Robin Tyler

Recent political referenda on gay issues are probably the most reliable signs that gays, as a distinct minority seeking legal protections equivalent to ethnic minorities, have become a legitimate concern for public decision making. Gone is the once near universal prejudice against and uncritical consciousness toward gays. Whether affirmed or rejected in particular referenda, it is clear that the gay liberation movement has reached a pinnacle in moving gay concerns from the realm of personal and moral discussion to public and political debate. The process of shaping and transforming public consciousness requires that point of legitimacy as a precondition to public receptivity to considering the merits of competing campaigns. Despite the successful campaigns in Seattle and California in 1978, the preceding and substantial rejections of pro-gay campaigns in Dade County, Florida; St. Paul, Minnesota; Wichita, Kansas; and Eugene, Oregon make it evident that no clear or overwhelming consensus exists for gay rights. What has changed is the exercise of the freedom to speak out on gay issues and an increasing willingness of the public to become more responsible listeners.

Proposition 6 appeared on the November 1978 California ballot. The proposition, frequently called the Briggs Initiative, after its originator Orange County state senator John Briggs, was placed on the ballot through an initiative campaign that gathered over 500,000 signatures. Proposition 6 however, was unlike previous initiatives designed to repeal ordinances protecting gays from discrimination in employment and/or housing. Rather, Proposition 6 was targeted specifically at teachers and required active discrimination against gays. Key portions of Section 2 of the initiative read as follows:

> (a) The governing board of a school district shall refuse to hire as an employee any person who has engaged in public homosexual activity or public homosexual conduct should the board determine that said activity or conduct renders the person unfit for service.
>
> (b) For purposes of this section (1) "public homosexual activity" means an act defined in subdivision (a) of Section 286 of the Penal Code, or in subdivision (a) of Section 288a of the Penal Code, upon any other person of the same sex, which is not discrete and not practiced in private, whether or not such act, at the time of its commission, constituted a crime;
>
> (c) "Public homosexual conduct" means the advocating, soliciting, imposing, encouraging, or promoting of private or public homosexual activity directed at, or likely to come to the attention of schoolchildren and/or other employee.

Essentially, the initiative would ban the hiring and require a hearing preliminary to the termination of employment of any employee who publically engaged in

homosexual activity or conduct. As public sexual activity is comparatively rare in the homosexual community, the force of the initiative would have fallen primarily on the openly gay teacher, the gay teacher who was a political activist outside of the classroom, and any teacher who in the classroom or public forums expressed opinions supportive of a homosexual lifestyle or gay rights. In this regard, the proposition clearly assesses penalties against those teachers exercising their freedom of speech on gay issues and the proposition would have the effect of a coercion restricting the exercise of that freedom. This infringement of a constitutional right was one of the important arguments against the initiative.

The remainder of this essay focuses primarily on the campaign against Proposition 6 in San Francisco. The campaign organizations, the campaign strategy of No on 6 advocates, press coverage, and the results and implications of the election will be covered.

Campaign Organizations

Although a large number of organizations participated in the campaign against Proposition 6, the three largest and most prominent were the No on 6 Committee of the Concerned Voters of California, the Bay Area Committee Against the Briggs Initiative, and San Franciscans Against 6. The No on 6 Committee of the Concerned Voters of California was a state-wide organization which had its northern California headquarters in San Francisco. This organization had a mixed membership of straights and gays, was the best funded of the organizations, had a mixed staff both in terms of the presence of straights and gays and in terms of paid and volunteer personnel. Don Bradley of the Bradley Group, a political consulting firm, served as state director of a campaign that was primarily oriented to the media in San Francisco and throughout the state. In part, because of the effectiveness of the other San Francisco organizations the media, particularly television spots against Proposition 6, played a smaller role in San Francisco than in other portions of the state considered more vulnerable. Television spots Against Proposition 6 were aired only during the last two weeks of the campaign, and coverage in San Francisco was at about 1/3 of the frequency of other portions of the state.

The Bay Area Committee Against the Briggs Initiative (known as BACABI for short) was co-chaired by Michael Mank and Paula Lichtenberg. BACABI attempted to complement the media campaign with a massive and visible campaign based on person to person contact. BACABI members distributed over a million pieces of campaign literature on street corners, in shopping centers and at churches, organized a debate between John Briggs and Rev. Bateman and San Francisco City Supervisor Harvey Milk and Sally Gearhart, a speech communication faculty member from San Francisco State University, that was carried on public television statewide. They also conducted rallies and speakouts and registered over 6,000 voters. The organization was predominately gay, completely volunteer, and more confrontational than the other organizations.

San Franciscans Against 6 was organized to conduct a traditional political campaign emphasizing selective voter registration, precinct work, and "get-out-the-vote" in San Francisco. Gwenn Craig and Bill Kraus coordinated the exclusively volunteer operations. The organization registered approximately 12,000 new voters in predominately gay neighborhoods, conducted door to door speaking campaigns in over 200 precincts selected as likely to have high proportions of undecided voters, distributed or mailed campaign literature to 90% of the remaining households in the city, and mobilized hundreds of volunteers to help get out the vote on election day.

Although these organizations were not formally coordinated, informal contacts between the coordinators of these organizations occurred regularly. Information and advice was exchanged, campaign literature shared, and volunteers referred to the respective organization most suited to their interests or abilities. Cooperation between BACABI and San Franciscans Against 6 was facilitated by the fact that their respective headquarters were in easy walking

distance. There was some occasional friction between the organizations. However, efforts were made to emphasize the different missions of the organizations and to conduct cooperatively a multi-phased campaign drawing on the diversity of the gay community as a strength.

Campaign Rhetoric

The campaign rhetoric against Proposition 6 may be divided into two primary thrusts. One thrust was essentially defensive, responding to the primary arguments raised by the proponents of the initiative. This thrust was directed to the refutation of claims that (1) homosexuals were child molesters, (2) that homosexual teachers would be role models, (3) that homosexual teachers would solicit and recruit children, (4) that homosexuals were immoral, (5) that homosexuals were demanding special treatment, (6) that parents had the right to choose not to have their children taught by homosexuals, and (7) that homosexuality was a threat to the family. The first three claims were rather easy to contradict and refute at the evidentiary level. Authorities and statistics were used which clearly and reliably indicated that child molesting was predominately heterosexual, that sex role modeling was largely completed prior to schooling, and that sexual solicitation or recruiting was rare. It was possible to counter-balance the moral argument largely through citation of various endorsements of gay rights by a variety of religious organizations. Since Proposition 6 was a proposal for active discrimination rather than the repeal of any special legislation for gays, the special treatment argument has little logical force. Even so, it was necessary to respond that gays sought no rights beyong those given to every citizen and accorded to other minority groups. This response was also key to laying a groundwork for the response to the superficially plausible parents' rights argument. Parents have a right to demand competent teachers for their child but not the right to deny a competent minority member (Black, Chicano, Gay) the opportunity to teach. Finally, that gays were a threat to the family was countered by the obvious fact that gays were raised and are parts of families and (what was a surprising fact to some initiative supporters) that many gays have children and families. These issues and replies appear throughout the No on Proposition 6 campaign literature. However, these claims were essentially defensive and dictated by the strategy and arguments of the proponents of the Briggs campaign.

Perhaps the more interesting and ultimately more important rhetoric in defeating the initiative was offensive in nature. The initiative was attacked as being an infringement of civil rights--particularly the constitutional freedoms of privacy, assembly, and speech--and the possibly high costs of the proposal. Various portions of the campaign literature tend to highlight these issues in bold print followed by explanations of how the initiative will invade privare lives and associations in the hearing process, threatens the jobs of school employees who publically acknowlege a gay sexual preference or comment positively on any aspect of the gay life style, and that the required hearings would be costly. Some estimated that each hearing might cost as much as $3,000.00. Since mere accusation would set the process in motion, there could be many hearings. However, cost estimates seem highly speculative.

Late in the election private polls conducted for the Concerned Voters of California suggested that the cost issue was one of two that was critical to approximately 10% of the voters who were not yet committed.[1] The remaining critical issue for these voters was whether current laws were already adequate. Fortunately, this point was also made recurrently in the No on 6 campaign literature.

The No on 6 literature placed heavy reliance on authority and citing of public opinion leaders. Facts were carefully quoted and sources were cited so that they could be verified. Heavy reliance was made on publicized endorsements believed to be influential. Political leaders from Jimmy Carter to Ronald Reagan and organizations from the American Civil Liberties Union and the AFL-CIO, to the United Methodist Church were cited and often quoted in their opposition to Proposition 6. It is fair to say that many responsible leaders, while not actively campaigning against Proposition 6, did make statements opposing it.

BACABI, SF Against 6, and CVC all made effective use of these statements in helping to make the public aware of the widespread opposition to the initiative.

Press Coverage

Press attention to Proposition 6 was inevitable and sustained throughout the election campaign. The Los Angeles Times, the San Francisco Chronicle, and the Sacramento Bee, three of the major newspapers in California, all editorially opposed Proposition 6. An examination of over 23 articles published between May 1978 and October 31, 1978 (the week immediately prior to the election) display a tone that varies from neutral to supportive toward gays in general and that was consistently antagonistic toward the Briggs Initiative. A sampling of the articles report events such as the State Senate's Industrial Relations Committee endorsing legislation prohibiting job discrimination against gays and explicitly comparing the situation of gays to that of blacks and other minorities.[2] Other articles attempted to present gays as ordinary human beings by describing events such as the formation of a gay doctors group in San Francisco,[3] a weekend retreat for gay parents,[4] a description of a gay Mardi Gras on Castro Street in San Francisco, and portraying gays from the working man's point of view.[5] Articles of this nature, although not explicitly on Proposition 6, presented an image of gays that the citizenry could both accept and identify with and thus helped destigmatize gays. Other articles announced opposition to Proposition 6 from opinion leaders such as Howard Jarvis,[6] Republican Attorney General Candidate Duekmejian[7] and State School Superintendent Riles.[8] Religious opposition to Proposition 6 received significant treatment. Several articles noted opposition to Proposition 6 by religious groups and leaders. On October 12, 1978 Catholic Archbishop John R. Quinn opposed Proposition 6 and was quoted as saying "homosexuals like everyone else should not suffer from prejudice against their basic human rights. They have a right to respect, friendship and justice."[9] Earlier Episcopal Bishop C. Kilmer Myers made an even stronger statement of opposition that was dramatized in the reporting by his picture in vestments with the underlying captioned quotation "Hitler began with homosexuals."[10] Most editorial coverage echoed the general line of No on 6 argumentation already mentioned in the campaign rhetoric section. Of key importance was the general tendency to reinforce the argument that current laws were adequate and that the new law would be costly and harmful.[11] In general the press took an antagonistic stance toward Briggs and the Briggs Initiative. Even when press coverage was ostensibly on the pro 6 campaign, it tended to draw either unfavorable comparisons with the opposition campaign or challenge its legitimacy. Even in interviews it seemed clear that the goal was to argue with and discredit Briggs rather than merely report his views.[12] Headlines such as "Quotations from Chairman Briggs,"[13] "Briggs sees Himself as Hero or Chump,"[14] "Briggs Attack Newsman,"[15] reports that Brigg's daughter dated a gay in high school,[16] and reports following debates suggesting Briggs is out of control[17] were common enough to tend to undermine the credibility of the author and chief advocate of Proposition 6. One reporter even went so far as to suggest that the Rotary and Lions' Club audiences did not buy Brigg's positions.[18] In general, the press played an important role in reinforcing the gay campaign arguments and reaching many parts of the public not easily accessible to gay groups. Moreover, as an independent and "unbiased" source of information, the press could not be easily discredited as a source. Unlike gays, the press ostensibly had nothing to lose. In general, the press acted responsibly and played an important role in the ultimate defeat of the Brigg's initiative.

Outcome and Implications

Proposition 6 was defeated with 3,903,705 votes against to 2,779,972 votes in favor. There were more votes against Proposition 6 than there were for Jerry Brown for Governor. In San Francisco, Proposition 6 was defeated nearly three to one with 164,073 votes against versus only 55,427 for. Given that early in the campaign most polls indicated that the proposition would be passed, what does this election mean? David Goodstein, publisher of The Advocate, called it "a major turning point in our centuries old struggle. It should serve notice to other political bigots who attempt to use irrational

fear of gay people as a stepping stone to further their own political interests."[19] Andrea Jepson, Media Coordinator for CVC in San Francisco felt that the election meant that "people aren't going to put up with this kind of discrimination. The election means people have made an informed decision that homosexuality as a life-style or as an accepted life-style is here to stay and the people of California have accepted that."[20] At the victory celebration a variety of civic leaders and gay spokespersons gave their interpretations. The late George Moscone, then Mayor of San Francisco, called it a "victory of intellect over ignorance and bigotry." Sally Gearhart, a lesbian speech communication professor at San Francisco State said, "Not only are we good and true and beautiful, but we have a lot of friends."[21] Each of these interpretations reflects some degree of truth. Clearly gays have political friends who will support and help defend their civil rights. Clearly prejudice against gays is not so strong or so widespread as to prevent responsible consideration and informed choice by a large segment of the voting population. And this in turn means that the political advantage in scapegoating gays is limited to a smaller constituency. However, it would be a mistake to generalize nationally on the basis of this campaign. It would be best to say that a defeat was averted by the rejection of Proposition 6, but little was gained in positive protection of the civil rights of gays or to provide redress of individual acts of discrimination. Even so, the campaign had an important impact on the gay community and its understanding and ability to organize and work in political campaigning. Gwenn Craig, co-coordinator of San Franciscans Against 6, expressed this long term implication best in saying:

> I think a lot of people have picked up a lot of skills during this campaign that we really need to capitalize on . . . . A lot of people who were never involved in any kind of political work before, who now have a lot more understanding of what goes on . . . . We've learned a lot of contacts, we've learned how to organize.
>
> There's a lot more organization that needs to go on in this community. There are a lot more services we could be giving to members of the community. I think now we have the skills at hand and the resources and contacts to do a lot more, and we should be about the business of doing it. We'll probably be seeing perhaps more publication, perhaps we'll see more national organization coming out of what we did. We didn't have as many links as we now do statewide. . . .

Gwenn also stated the more immediate implication:

> I think it meant a lot of hard work can pay off. We were joking a lot during the election night that this was the American dream come true--hard work pays off. . . . The next time we have to get together or the next hurdle we face, we can do that more effectively, we've learned who our friends are, we learned who are not our friends, we needed that information if we're going to adequately protect ourselves. I guess it means a lot more clout.[22]

Elections are significant events especially when laws and programs are enacted to channel constructive change and enable social progress and justice. This campaign averted the passage of a regressive law; it united the gay community in opposition to potential legal oppression; it enabled gays to gain significant political skills; and it succeeded in reaching many citizens outside the gay community and winning their support. It is from the mixture of improved political skills and organization among gays and the larger and growing informed and supportive non-gay community and correspondingly shrinking constituency of the misinformed that future progress depends upon. A 60%-40% victory is a substantial one, but the opponents still wield considerable power. That the general public has rejected direct discrimination is a necessary but not sufficient condition to broader support. Continual efforts to inform the public and replace fear with understanding are essential if the "clout" is to be sustained.

[1]Don Bradley "State Poll Results - What Arguments Affect the Undecided Vote?" Concerned Voters of California Memorandum, October 16, 1978.

[2]"A Victory for Gays in Battle to Ban Job Discrimination," San Francisco Examiner. May 3, 1978, p. 6.

[3]"Gay Doctor's Group is First in U.S.," San Francisco Chronicle, September 22, 1978.

[4]Ruth Stein. "A Weekend Conference for Gay Parents," San Francisco Chronicle. September 22, 1978.

[5]Warren Hinckle "SF Stays Happy as the Streets Go Gay." San Francisco Chronicle. August 24, 1978, p. 4.

[6]Ron Javers. "Angry SF Renters Subpoena Jarvis: Jarvis Prop. 6 Foe," San Francisco Chronicle, September 29, 1978, p. 11.

[7]Jerry Burns. "GOP Candidate Deukmejian Raps Anti-Gay Initiative," San Francisco Chronicle. September 9, 1978, p. 6.

[8]"Riles Says There's no Need for Prop. 6," San Francisco Chronicle. September 7, 1978, p. 10.

[9]San Francisco Examiner. October 12, 1978, p. 9.

[10]Andrew Curtin. "Bishop Comes Back Strong--Warns about Briggs Initiative." San Francisco Examiner. September 4, 1978, p. 4.

[11]"Legal Opinion Call Prop. 6 Too Vague." San Francisco Chronicle. September 8, 1978; Herb Caen "The Way We Are" (Editorial) San Francisco Chronicle. September 10, 1978; Charles McCabe "Himself," San Francisco Chronicle, September 14, 1978, and Ellen Goodman "California's dynamic duo" San Francisco Examiner, September 26, 1978. Editorial Los Angeles Times, October 13, 1978.

[12]Robert Scheer. "A Times Interview with Sen. John Briggs on Homosexuality," Los Angeles Times. October 6, 1978, pp. 1, 26-27.

[13]Jeff Jarvis. San Francisco Examiner, October 1, 1978, p. A7.

[14]San Francisco Chronicle. September 22, 1978.

[15]Los Angeles Herald Examiner. October 12, 1978, p. 1.

[16]San Francisco Examiner. September 22, 1978, p. 5.

[17]Raul Ramirez. "Verbal, physical scuffling mark debate on Prop. 6," San Francisco Examiner, October 12, 1978, p. 16.

[18]Ron Javers. "John Briggs Models a Role." San Francisco Chronicle. October 16, 1978, p. 8.

[19]Jerry Carroll. "Gay Happy Days Are Here Again," San Francisco Chronicle. November 8, 1978, p. 3.

[20]Personal Interview on November 8, 1978.

[21]Author observation.

[22]Personal Interview November 8, 1978. ND: This study originally appeared in a slightly different form in the Western Speech Communication Association's Freedom of Speech Newsletter, VI (December 1979), 3-10. It is reprinted here by permission.

"DEEP THROAT" IN DEEP TROUBLE ON A COLLEGE CAMPUS: AN ACADEMIC FREEDOM CASE STUDY

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Introduction

In 1957 in Roth v. United States the U.S. Supreme Court made its first attempt to define obscenity.[1] Justice William Brennan, writing for the majority, said that a work was obscene--and thus devoid of First Amendment protection--if taken as a whole it appealed primarily to prurient interest. The average person and the contemporary community were to be the standards of judgment. In the years that followed, in a plethora of cases, judges, jurors, and justices wrestled with the normative terms used in the definition of obscenity. Who was the average person?[2] And what were the standards of a community? Were they local or national in scope?[3] Brennan himself tried to supply an answer to these questions and others, but by 1973 he concluded that the Court's attempts to formulate a satisfactory definition of obscenity had been futile. "I am forced to conclude that the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a by-product of the attempt to suppress unprotected speech, and to avoid very costly institutional harm."[4]

The majority of the Court, however, thought otherwise. Chief Justice Warren Burger fashioned a three-tiered definition of obscenity that included the original Roth test and two other criteria. First, the work had to depict or describe in a patently offensive manner sexual acts proscribed by the relevant state statute, and second, the work had to lack serious literary, artistic, political, or scientific value--the so-called LAPS Test.[5]

Unfortunately, the new test for obscenity provided little clarification for an area Douglas referred to as a "hodge-podge." A year after the Miller decision in which Burger announced the revised criteria for obscenity, a jury in Albany, Georgia, applied those criteria and found the film "Carnal Knowledge" obscene. The Supereme Court of Georgia affirmed the lower court's decision. But the U.S. Supreme Court reversed and said that the film, which was widely acclaimed by critics, was simply not its idea of hard-core pornography (obscenity). "Our view of the film satisfies us that 'Carnal Knowledge' could not be found under the Miller standards to depict sexual conduct in a patently offensive way."[7] Like Churchill's assessment of the Soviet Union--a riddle wrapped in a mystery inside an enigma--obscenity seemed to represent a jurisprudencial quagmire, one that prompted Justice Potter Stewart to exclaim that while he might not be able to define obscenity, he knew it when he saw it.[8]

The Supreme Court's definitions and deliberations regarding obscenity provided the backdrop for a class project in a Regulation of Mass Media course which I taught at the University of West Florida in the Spring of 1977. Students were given a hypothetical situation involving the showing of an allegedly obscene film and were asked to act as jurors and render a legal opinion about whether constitutional protection should be afforded for exhibition of the film. Specifically, they were to assume that a theatre owner had been charged with showing the pornographic film "Deep Throat" in a commercial theatre in Pensacola, Florida (the community in which the university is located). Furthermore, they were to assume that a local jury and the Florida Supreme Court had found the theatre owner guilty of violating the state's obscenity statute (which follows the guidelines enunciated in Miller v. California). Thus, students, or groups of students as they were aggregated into groups of three or five, were to act

as Supreme Court justices. If the group decision was unanimous, students were to write a single opinion. If there was disagreement, the majority was to formulate a majority opinion while the minority was to fashion a dissenting one.[9]

A videotaped copy of "Deep Throat" was made available for viewing just as it would have been had the case occurred in a real courtroom. Students were forewarned, however, of the content of the film and of the possibility that they could be offended by it. Viewing was therefore voluntary.[10] To insure further that there was no implicit pressure to see the film, viewing took place outside the classroom away from the presence of the instructor. On May 10 and 11, the film was shown in a room near the main office of the Communication Arts department. A secretary scheduled viewing times and turned on the videotape.

Prior to the showing of the film, I had arranged for the local State Attorney, Curtis Golden, to visit the Regulation class to discuss his attempts to control pornography in Northwest Florida. Though no mention was made of the class project, I had no doubt that "Deep Throat" would provoke many questions. It had been shown in Pensacola in 1973 to an estimated twelve thousand people.[11] After the Miller decision came down, the State Attorney sought to enjoin exhibition of the film, but it was whisked out of town before law enforcement officials could act.

Arrangements for Mr. Golden's visit were made through his assistant and former campaign manager, Wayne Smith. Later, I learned that Mr. Smith's daughter-in-law was a member of the Regulation class, and through her, the State Attorney's office learned of the screening of the film (See footnote[12]).

On May 11 a student phoned to say he had been asked to appear before the State Attorney. He wondered whether the inquiry might have something to do with his viewing of "Deep Throat." Within an hour he called again to say that the showing of the film was indeed the subject of the inquiry.[12] The next morning I visited the State Attorney's office to offer an explanation of the class assignment and to point out why I thought my actions were legal. The State Attorney replied, however, that he was obligated to investigate a complaint and would therefore continue to subpoena and question students in the class.[13]

My next step was to inform university officials of what had taken place. During a meeting with the chairman of the department and the dean of the college, I mentioned that the State Attorney would not tell me the name of the person who had lodged a complaint but said that a certain state legislator was very upset about the matter. As it turned out, the legislator was Ed Fortune, Chairman of the House Appropriations Committee and a local resident. His daughter, Felicia Smith, was a member of the Regulation class. She was also the the daughter-in-law of the State Attorney's assistant. The meeting with the chairman and dean ended with an assessment of my action: the dean believed I had exercised bad jugment in allowing students to view a pornographic film. Interestingly, the conversation turned out to be my last formal contact with university administrators until a grievance was filed in my behalf by the faculty organization (or union) that is the official bargaining agent for the State University System.

Word of the State Attorney's investigation spread quickly. The local newspaper carried a story on May 13 entitled "UWF Class on Obscenity Sparks Probe."[14] From that moment, the "'Deep Throat' incident" became a cause celebre--"the juiciest controversy to hit Pensacola in months."[15] The publicity prompted a variety of reactions and controversies, each of which revealed important differences in the perceived boundaries of freedom of expression among various segments of the community. First, there was the anticipated town-gown flap--an outcry from fundamentalist ministers and other citizens who were appalled that a college professor would show students a pornographic film and then hide behind the shield of academic freedom and the First Amendment.[16] A second level of controversy took place within the university and the State University System. Concerns about academic freedom were balanced by concerns about legislative retaliation. Finally, the controversy made its way to the courtroom after the

State Attorney moved to have the film declared obscene and destroyed. This action, along with the reaction of the public and the legislature, provided a formidable test of academic freedom and academic leadership.

Public Reaction

In addition to carrying stories about the showing of "Deep Throat" and the ensuing investigation, the news media also offered editorial comments. The local newspaper, for example, thought the showing of the film was understandable and that the State Attorney's investigation should be terminated if he were to learn that only the students in the Regulation class were allowed to view it.[17]

> Since the regulation of films deals mainly with obscenity, . . . he asked those students who wanted to do so to view the film, outside classroom hours, in small groups so they would have before them an example of the type of films with which the law deals--"Deep Throat" film being a celebrated case.
>
> He said it was voluntary and that he warned students in advance of the contents of the film. Frankly, we don't see a great deal of harm in this. . . . If only the students are involved, and they tell Golden their interests were academic and not prurient, then the matter ought to end right there.[18]

The only local radio station which editorializes was also tolerant of the film's use in the classroom. "Like it or not, consideration of the movie in a strictly academic atmosphere, with proper restrictions, is, in our opinion, suitable educational material for young adults who are studying the impact of the media on the public."[19]

The area's commercial television station, however, took a different view of the matter. In remarks directed to the students in the Regulation class, the station manager stated:

> Just exactly what was it that you hoped to learn from the likes of "Deep Throat"? Admittedly, there have been plagues visited upon Northwest Florida in recent years, but pornographic movies hasn't really been one of them, and we wonder whether the University of West Florida, normally a boon to our area, really wants to count among its credentials and accomplishments the fact that it pioneered hard core pornography in this area. . . . We assume that most of you students are kept at the University as a result of your parents' benevolence and plain hard work. We wonder what they would say if they knew of your activities. Why not write a letter home to dear old Mom and let her know of your new found interest in Linda Lovelace.[20]

A week after the station manager's editorial was aired, another editorial was broadcast--this one by a member of the Regulation class.[21] The student-generated editorial sought to characterize the one delivered by the station manager as emotional and misleading:

> You characterize us, that is, the class as "people whose activities were unexpectedly exposed." The clear implication of this is that we were doing something illegal or immoral or otherwise wrong. A survey of class members shows that not one of the students felt that he or she had done something wrong. . . . You asked what we hoped to learn from

> "Deep Throat." The answer is: the law. Whether or not a student saw the entire film clip, walked out on it, or declined to see it at all, the class project enabled us to learn a great deal about obscenity laws and the Constitution, and the the difficult job that the Supreme Court and the States have in determining legal questions about obscenity. . . . Secondly, we hardly consider that the optional, private showing of the film to the 35 students of the class constitutes "pioneering pornography in this area." . . .
>
> You state that "most of the students are kept at the university as a result of your parents' benevolence and plain hard work." The facts are that 27 of the 30 people in the class available for the survey are either putting themselves through school entirely on their own or at least hold jobs to help with the expense.[22]

While the rebuttal editorial was hailed by most class members as vindication, the station manager had the last word. On May 27 he delivered another editorial on the "Deep Throat" incident. In this one he reaffirmed his belief that the showing of the film was wrong and possibly illegal.

> Forty-five minutes of "Deep Throat" as an official act of the University of West Florida is wrong. We said it was wrong last Thursday, and we repeat it tonight--and no matter what benefits on the understanding of law are claimed, we would hope that better ways of communicating the content of pornography can be found in the future. Academic freedom can be absolute no more than free speech can. You can't shout "fire" in a crowded theatre and you can't justify forty-five minutes of pornography by making it part of a college course.[23]

Community reaction to the use of "Deep Throat" in the classroom surfaced in other ways in the media--particularly in newspapers. The "Letters to the Editor" or "Voice of the People" sections of newspapers in the area were overwhelmingly critical of the showing of the film. A letter written by a minister of a nearby community stated: "Showing this material, the professor cheapens the students of the class, cheapens the university as an institution, cheapens the taxpayer and citizens and cheapens his own heritage as a member of the human family."[24] Another, written by a group of ministers in an adjacent county, proclaimed: "We, the Santa Rosa Ministerial Fellowship, hereby express our indignation at the use of pornographic material in the form of the film 'Deep Throat' for teaching purposes in public, tax supported institutions."[25] One letter, expressing the concern that academic freedom might "override the necessity for uniform rules and regulations," suggested a course of action. "I guess what it all boils down to is that it appears that there is a big weeding job laying here for the trustees of our alleged university to tackle."[26]

The Pensacola newspaper carried a public opinion article entitled "If You Ask Me." Photographs of individuals who were interviewed were displayed above their responses to the question, "Do you think the movie 'Deep Throat' should have been shown to university students as a class project?" Surprisingly, perhaps, eight of the ten people who were interviewed found nothing wrong with the class project.[27] A similar survey was conducted by the local public television station. Of the seven persons whose opinions were featured during one of the station's evening newscasts, four indicated that use of the film was proper.[28]

A position quite different from that reflected in the opinion polls was taken by a Christian organization comprised mainly of fundamentalist businessmen. The sponsored a newspaper advertisement labeled "We Protest." The ad stated:

> Anyone that would try to hide behind academic freedom to show the movie "Deep Throat" should be given their walking papers. We are sick of all the filth that has come from many of our institutions of higher learning during the past twenty years under the label of "academic freedom."[29]

The advertisement urged the president of the university to take action, and if he did not, the ad suggested that the Board of Regents take action against the president.[30]

There were few phone calls to me criticizing use of the film--but numerous letters, almost all of which were chock-full of Biblical quotations. One letter declared:

> So the truth is out? But did you not earlier consider the ancient wisdom? "Be sure your sin will find you out." . . . A greater teacher than you or I is recorded to have said, "There is nothing covered that shall not be revealed; neither hid that shall not be known."[31]

An anonymous letter which contained a quotation from the book of Matthew warned, "Hell will be full of your students and you, their stumbling block will be among them."[32] A more conciliatory letter came from a woman in Lodi, California. Aware that the film had been shown in a class, she admonished:

> I would like to remind you that this is a stench in the nostrils of God and you are contributing to the downfall of young people as well as sending your own soul to hell. God loves you and wants for you his richest blessing and life so full and so blessed with God's peace, love and comfort. God can and will forgive no matter what we do and it is this love and forgiveness that I pray you will seek.[33]

Similar letters were received by the president of the university. One told of a family's "concern about the dreadful situation" and of its alertness to subtle and blatant attempts to "polute" the community with "filth related to sex, violence, pornography, and homosexuality."[34] The latter issue seemed to be of equal interest, for the letter asked, "And what is the status of the homosexual on your staff or have I been misinformed?" The note to the president ended with a lengthy complimentary closing: "Yours for decency and IN LOVE FOR GOD AND COUNTRY. Sincerely, A friend-in-Christ, May God bless you as only He can."[35]

The University and Board of Regents Response

The divergent and often polarized views of the public caused a great deal of consternation within the university and the State University System. For the most part, students and faculty were supportive of what had taken place. In fact, as soon as Student Government members learned of the State Attorney's investigation, they issued a call for a special meeting to pass a resolution supporting "Dr. Churchill Roberts in his quest to further academic and intellectual freedom in the university environment."[36]

The university's Faculty Council also took action. In response to an article in the paper in which the president of the university allegedly assured Representative Fortune that no film such as "Deep Throat" would ever be shown again, the Council called a meeting to query the president about his remarks.[37] The president told the Council he did not recall the precise words he used in his conversation with the state legislator, nor did he know at the time the circumstances surrounding the showing of the film. The president declined any further comment, noting that:

> Under Board of Regents policy, and the agreement between the board and the United Faculty of Florida, the contents

> of official personnel evaluations are confidential . . . . Therefore, the university will have nothing to say publicly about the faculty member concerned in this incident.[38]

In the week following the president's meeting with the Faculty Council, the chairman of the Florida Board of Regents, Marshall Criser, sent a letter to me criticizing the use of "Deep Throat." "Despite what might have been considered reasonable safeguards by you I cannot but conclude that you exercised inexcusable bad judgment in involving students of a state university, whether or not on a mandatory basis, in such an offensive presentation."[39] Copies of the letter were sent to other regents and to the president of the university who was asked to include the letter in my personnel file.

The regent who lived in Pensacola concurred with Chairman Criser:

> According to all press reports, it appears you feel you took every reasonable and proper caution prior to showing the movie. However, as a Regent, I have a responsibility to carry out and I strongly urge you to consider making an apology to the University for this incident.
>
> While your actions did not have criminal intent, I believe you could have exercised restraint and avoided placing the University and the Board of Regents in the position of having to defend or criticize your actions.[40]

Besides sending his own letter, the regent delivered a copy of the chairman's letter to the newspaper which ran it under the heading, "'Deep Throat' Showing Bad Judgment."[41] The letter's appearance in the paper promoted the faculty union to issue a statement to the press. The statement supported my use of the film and condemned the chairman of the Board of Regents for allowing his letter to be published. "For either an administrator or a member of the Board to make an evaluation of a professor which will be a part of his official record and to make it public is a violation of the agreement between the union and the Board of Regents, as Mr. Criser should know."[42]

The majority of students in the Regulation class were also perturbed by Mr. Criser's remarks. Despite an intensive amount of publicity, they had continued to work on the class project and on May 19 presented their results. Five of the eight groups decided the film was worthy of the First Amendment protection, though only one group did so on the basis of its artistic merits. The other four groups took either an absolutist First Amendment position or agreed with Justice Brennan that a definition of sufficient clarity could not be formulated without eroding individual rights guaranteed by the First Amendment. Three groups, however, thought that obscene materials should be controlled and that "Deept Throat" met the test for obscenity. Regardless of their judicial decision, most of them believed the project had been beneficial and that they had learned a great deal about obscenity law. They saw Mr. Criser's assessment as a political reaction, one that cast the project (and the professor) in a false light. A letter addressed to the Board chairman and signed by twenty-eight of the thirty-five students declared:

> It is our contention that the many hours we have spent reviewing the decisions of the Unites States Supreme Court . . . concerning this confused area of jurisprudence . . . will satisfy the most exacting professional assessment of the educational merit of this assignment.
>
> We feel, further, that it is an injustice to attempt to appease the general public's misunderstanding of the educational validity of our study with the sacrifice of Dr. Roberts' career. Thus, we denounce the ignoble means employed by Dr. Roberts' private, public, and administrative

> accusers in their attempt to malign his character and impugn his integrity as a professional educator.
>
> We believe that the truth of this issue will live long after the cries of the defamers have ceased. And that truth is: the overwhelming majority of the students in the class are unreserved in their support of the educational discretion exercised by Dr. Roberts in his determination of content for this course; that the project and course have been an invaluable educational experience; and that the noble pursuit of truth in our educational community has been justifiably served.[43]

The actions of the Board chairman and the local regent seemed to be an attempt to placate the chairman of the House Appropriations Committee (Representative Fortune), who controlled the purse strings of the universities. In the days that followed the State Attorney's investigation, Fortune told the press that showing "Deep Throat" was morally wrong and that his daughter had sat through one scene and left. He further stated: "I'm not going to forget this. I want to be continually assured and the community deserves to be assured, that it will not happen again."[44]

Whatever assurances Fortune sought, including the one from the president of the university who supposedly told Fortune that a movie like "Deep Throat" would never be shown again, they were apparently not satisfactory; for the representative introduced a bill to the legislature to establish curriculum review boards at each university and community college in the state. The boards, which were to be comprised of faculty appointed by the president, were to screen all films and other curricula for material which might be pornographic. The final Senate version of the bill, the one which was eventually passed, read as follows:

> Curriculum Screening Committee--
>
> The Board of Regents of the State University System and the Board of Trustees of each community college are hereby directed to establish rules to require the creation of a curriculum screening committee in each university and community college to review films and course curricula to to determine the compliance with community standards on pornography.[45]

Several legislators questioned the Fortune proposal. Representative Bill Sadowski thought the bill would be unconstitutional. Another representative, Alan Becker, stated that "imposing prior restraint on movies and literature for whatever reason now would later lead to restraints on expressing political opinion."[46] When the Senate initially attempted to water down the bill by making the screening committees optional, Fortune read House members a letter from one of his constituents describing a "simulated sex act" which took place in a theatre course at the University of West Florida.

> During the final exam for a drama class at the end of the fall quarter this year, Dr. Thomas Long allowed a male student to strip naked and simulate the acts of intercourse with a female student, almost naked, on stage in front of the entire class.
>
> The student was portraying a deranged individual who had had sex relations with a horse and decided to try a girl, after which he decided he liked horses better.[47]

Fortune said the letter supported his contention that screening committees were necessary.

Though the charges in the letter were denied by students who had performed a scene from the play "Equus,"[48] revelation of the incident prompted the

local newspaper, which had opposed Fortune's bill, to call for tighter university controls.

> . . . if our university classes are being run, with no front-office direction, by professors who will deliberately choose or allow to be chosen the most offensive and controversial materials around to be presented to students, then the universities themselves are putting the ammunition in the hands of those politicians who want more direct control over the university.
>
> Surely, something other than the degrading and disgusting play "Equus" could have been found with which to teach students the fundamentals of acting; this professor did not even have the excuse that it was necessary to teach the course.
>
> We don't need and don't want censorship committees . . . .
>
> But we do need stronger leadership on campus to avoid the type of overpermissive excess which gives politicians a perfect opportunity to demonstrate their own purity of behavior and thought to their constituents.[49]

Publicity about the "Equus" performance spurred the legislature to pass the screening bill and send it to the governor. Fearing the implications of the hastily-passed measure, the university community, including such groups as the Board of Regents, United Faculty of Florida (UFF), and the American Association of University Professors (AAUP), mounted campaigns calling for the governor's veto. The chancellor of the State University System, in a letter to the governor, noted that the University of West Florida had recently established an ethics committee. He suggested that the university's action, along with the letter of reprimand from the chairman of the Board of Regents, was sufficient response to the "Deep Throat" matter.[50] The chancellor also noted that passage of the bill would "stigmatize Florida's higher education system in the academic world."[51]

The faculty union was even more vehement in its denunciation of the bill. UFF president Ken Megill said a disturbing "witch hunt" atmosphere surrounded its passage.[52] Officers of the Florida State University Chapter of AAUP were likewise concerned. In a letter to the governor, they warned that the bill "would have a chilling effect upon educational innovation, professional quality, and even the direct discussion of major literary, dramatic, and artistic classics: in short, on all the basic dimensions of freedom in the classroom to discuss one's subject at the highest possible professional level."[53] The officers added that if the bill became law, they "would have no choice but to take whatever legal steps . . . necessary to oppose it."[54]

The major newspapers in Florida also opposed Fortune's bill. The Pensacola Journal even carried a cartoon ridiculing the legislative mentality that seemed to prevail. The cartoon showed a smiling legislator wearing a pin-striped suit and cowboy hat holding an oversized club with a nail through it. The caption read: "Relax! I'm guardin' yo' academic freedom."[55]

On June 29 Florida Governor Reubin Askew vetoed the bill calling for curriculum screening committees. The Governor stated that while showing the film was a serious mistake, it was an exception to prevailing practices.[56] Representative Fortune replied that he was shocked by the Governor's action and vowed to override the veto during the next legislative session. But as time passed and the furor over the incident diminished, the cry for screening committees subsided.

Although the Board of Regents could claim success in helping to have the screening committee bill quashed, it could not do so in defending its means of allaying public and legislative fears. As was mentioned earlier, the initial response of the Board to the "Deep Throat" incident was a letter of reprimand from its chairman. When the letter was released to the public and published, the faculty union (UFF) filed a grievance arguing that publication of a letter intended to be a part of a faculty member's personnel file was a violation of the

contract between the Board and the union. Though the university, understandably not wishing to usurp the authority of the Board chairman, rejected that argument, the State University System's labor relations coordinator, Robert Carroll, thought otherwise. Ruling on a technicality, Carroll noted:

> In as much as the contents contained in the letter are evaluative in nature but were not generated or reviewed as part of the evaluation process, the letter should not be part of the grievant's evaluation file. UWF should remove the letter from the evaluation portion of the file.[57]

A memorandum of September 7 from the Dean of Arts and Sciences to the Academic Vice-President acknowledged removal of the letter.[58] No further criticism, public or private (e.g., in an annual faculty evaluation), was ever directed to me by university officials about the "Deep Throat" incident.

The Legal Proceedings

While the local community and university administrators, including those at the state level, voiced opinions on the moral and ethical aspects of allowing students to view a pornographic film, the legal right of allowing such action rested with the court--the setting for the third avenue of controversy. The videotape of "Deep Throat" had been voluntarily turned over to the State Attorney's office for review. Following his investigation, State Attorney Golden announced that he did not intend to press charges against me but that he would "seek a court order to destroy the videotaped . . . film."[59] Although he had not seen the film, he declared it was "definitely hard core pornography."[60]

The road to the courtroom was not a smooth one. The judge who had been handed the "Deep Throat" case was asked by defense attorney George Estess to step aside when it was discovered that the judge's daughter-in-law was a secretary in the State Attorney's office. A second and potentially more serious problem had to do with standing before the court. Prosecuting attorney Richard Schlering (the lawyer in the State Attorney's office who had been assigned the case) argued that the videotape carried a university identification number and therefore belonged to the university. As a consequence, the only one with proper authority to contest the film's destruction would be an official of the university.[61] Both matters were soon resolved. The initial judge recused himself, and the issue of standing was dropped when the prosecuting and defense attorneys agreed that the university would not likely be able to establish proof of ownership.

In March of 1978 a forfeiture hearing took place in the County Court. No jury was involved. The judge, Frank Bell, began the hearing by showing the videotape to those who would be called to testify as expert witnesses (members of the press were also allowed to watch the videotape). Interestingly, the State Attorney offered himself as an expert witness on community standards. The hearing lasted two days. Most of the witnesses who were called were students in the class, though several faculty testified.[62] Only one faculty member, however, testified for the State, and his point was that while he taught a media law course (at a university in another state) which included a section on pornography, he did not find it necessary to show a pornographic film.[63]

As the hearing proceeded, the prosecuting attorney focused on the point that the decision should be based solely on the content of the film, while the defense maintained that the context in which the film was shown must be taken into account. In the educational setting, defense attorney Estess argued, the film had scientific value and therefore failed the third part of the Miller test. That is, it failed to lack serious literary, artistic, political, or scientific value--a requisite to be judged obscene. At one point, the judge asked the prosecuting attorney whether he intended to call anyone who had seen the film to testify that the experience had not had educational value. The attorney replied that he did not, whereupon the defense promptly called for a directed verdict--but the motion was denied.[64]

Eleven days after the hearing Judge Bell ruled that "Deep Throat" was obscene by a reasonable doubt by the preponderance of the evidence. He declared that the film should be destroyed but noted that:

> Dr. Roberts is not on trial. This is not the State of Florida versus Dr. Roberts. It's in regard to "Deep Throat." I might also mention that academic freedom is not on trial. It could be a subissue of academic responsibility or however you want to phrase it. What is on trial is the film itself.[65]

Bell ordered a stay of his ruling so that an appeal could be made to the Florida Supreme Court.

At the appellate level, the American Association of University Professors (AAUP) filed an amicus brief which also argued that the Miller test had not been met. The brief pointed out that the film had been shown in a controlled setting for educational purposes and was therefore not the kind of commercial pornography generally associated with obscenity cases. It also stated that "Deep Throat" was not used to appeal to prurient interest but to educate students through critical viewing and discussion of controversial material. In such circumstances, the brief said, the film possessed political (as well as scientific) value.

> It cannot be denied that the issue of obscenity regulation is a legitimate and important political question. When court decisions are continually criticized for being either too restrictive, when obscenity trials are reported in the newspapers on an almost daily basis, when some states have eliminated obscenity laws while others have strengthened them, and when there is a wide range of available political alternatives for dealing with obscenity . . ., obscenity regulation constitutes a political issue of vital contemporary importance. Whatever may be the diverse goals of higher education, one of those goals must be to prepare students for the roles they will play as citizens and political leaders in governing our society. It is clear that a responsible citizen or legislator will have a greater appreciation of the issues involved if he or she can see the kinds of materials that are generating the current controversy.[66]

In the course of oral arguments, which took place in December of 1978, the attorney assigned to defend the State's seizure of the film (videotape) conceded that it could be used for educational purposes. Responding to questions from Justice Ben Overton, the attorney first acknowledged that examples of pornographic films could be shown to a prosecutors' association so that they would know what to prosecute. Next, the attorney agreed that a bar association could conduct a similar training program. Finally, the State's attorney conceded that with proper guidelines a college journalism class could also exhibit pornographic films. The Pensacola Journal remarked that the "barrage of tough questions" directed to the Assistant Attorney General was so intense that he was often left "groping for answers" and had little time to make his argument.[67]

In July of 1979 the Florida Supreme Court announced its decision.[68] It reversed the lower court order calling for destruction of the film--but on grounds which avoided the constitutional issues. Justice Joseph Hatchett, in a 6-1 majority opinion, declared that the film had been improperly seized. According to Hatchett, proper adjudication would have required the issuance of a warrant and judicial inquiry regarding probable obscenity prior to a hearing on the State's petition for confiscation and destruction of the film. But as a reply brief of the defense had pointed out, the videotape which had been voluntarily surrendered was held in a State Investigator's car for several months before being deposited with the Clerk of the Court.[69] Another six months passed before the State filed a petition for an order to find probable cause.

Hatchett also stated that the section of the obscenity statute dealing

with forfeiture had been improperly applied, for it should have come into play only when a trial judge had "made a determination as to criminal conduct."[70] In other words, an individual must first be prosecuted under a criminal statute (i.e., the obscenity statute) before the disposition of the material in question can be resolved. The State Attorney had considered pressing criminal charges but declined to do so because he believed he could not obtain a conviction.[71]

Conclusions

The Florida Supreme Court's decision brought an end to the legal dispute. The State did not appeal, and the videotape was eventually returned to me.[72] Despite the fact that "Deep Throat" is still the subject of litigation in various state and federal courts, it has not been used again in the Regulation class. Reluctance to do so may underscore the damage that has been done to academic freedom, for the actions (or inactions) of the University of West Florida administration and the Board of Regents suggest that unpopular ideas or unpopular teaching methods will not be supported.

In his letter of criticism concerning the use of the film, the chairman of the Board of Regents indicated that he would continue to defend "academic freedom and constitutional individual rights of faculty."[73] Yet his words were not reassuring, for in a comparative survey of faculty of thirty-seven state universities carried out by the Educational Testing Service, the University of West Florida (the only Florida university included in the survey) ranked last in perceptions of academic freedom. When asked whether university trustees would support the principle of freedom for faculty and students to discuss any topic, only four percent of the faculty strongly agreed. Thirty-five percent disagreed with the statement, and thirty-two percent disagreed strongly. In responses to another question, seventy-two percent of the faculty either disagreed or disagreed strongly with a statement that eccentric or unpopular beliefs would not usually be frowned on by the administration.[74]

Because students and faculty are largely insulated from public and political pressure, they are perhaps freer than administrators to be idealistic in their views about academic freedom. On the other hand, those who place the parameters of academic inquiry within a context of social acceptance run the risk of transforming a cherished right into mere tinsel. The "Deep Throat" controversy pitted the university against itself and against the community and against the legislature. No person or group emerged as a winner, but a likely loser was reflected in the attitudes of West Florida faculty who may be inclined to believe that the pursuit of truth is confined to certain subject matter and certain means of exploration. More seriously, they may act on those beliefs.

Endnotes

[1]Roth v. United States, 354 U.S. 476 (1957)

[2]For an interesting discussion of the "average person," see George N. Gordon, Erotic Communication (New York: Hastings House, 1980), pp. 148-150. For a legal update see Pinkus v. United States, 436 U.S. 293 (1978).

[3]See Justice Harlan's opinion in Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) and Justice Brennan's opinion in Jacobellis v. Ohio, 378 U.S. 184 (1964).

[4]Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973), p. 103.

[5]Miller v. California, 413 U.S. 15 (1973).

[6]Ibid., p. 43.

[7]Jenkins v. Georgia, 418 U.S. 153 (1974), p. 161.

[8]Jacobellis v. Ohio.

[9]In some cases, students submitted a concurring opinion, agreeing with the majority or minority decision but for a different reason.

[10]In the court case that later transpired, a transcript of an audiotaped lecture in which voluntary viewing was emphasized was submitted as evidence. Also, students who testified in court stated that viewing was voluntary.

[11]Dot Brown, "'Decency' Group to Decide Community Standards," Pensacola Journal, 22 April 1977, pp. 1B & 3B.

[12]The student was employed by the local commercial television station (WEAR) and was at work when he was contacted and asked to come to the State Attorney's office immediately. The urgency of the request upset the student who called me and an attorney in trying to determine why he had been contacted and what his course of action should be. In the meantime, the State Attorney and his assistant went to the station and personally served a subpoena and questioned the student. Later, it was discovered that the student's name was furnished by the daughter-in-law of the State Attorney's assistant. She was a member of the Regulation class but had not viewed the entire film, nor had a friend of hers who was in the class. The State Attorney wished to question someone who had seen the film in its entirety, and the student at the television station was the only class member whose name she and her friend could recall.

[13]The question of whether the complaint originated inside or outside the State Attorney's office was never satisfactorily resolved. In the hearing at the County Court, the prosecuting attorney told the judge that Felicia Smith (the daughter of state legislator Ed Fortune, and daughter-in-law of the State Attorney's assistant, Wayne Smith) was the one who complained. But in a personal conversation with me, Ms. Smith said she never complained but simply mentioned the class assignment to her husband, and later to her father-in-law.

[14]Pensacola Journal, 13 May 1977, pp. 1A & 3A.

[15]Pensacola Journal, 20 May 1977, pp. 1A & 10A.

[16]A typical letter to the editor exclaimed: "What amazes me is the cry which goes up from some in the university community about academic freedom. Just how far do these people think freedom ought to go in the name of education?" Pensacola Journal 16 June 1977, p. 20A.

[17]The newspaper later decided that showing the film was not proper. Referring to the incident, an editorial noted: "It was, in our opinion, an error of judgment. But it touched off such a furor and caused so much negative public reaction that we doubt its like will occur again anywhere around the state --and if it does there are already plenty of university regulations to handle the situation." Pensacola Journal, 19 August 1977, p. 16 A.

[18]Pensacola Journal, 14 May 1977, p. 8A.

[19]WCOA editorial, 19 May 1977.

[20]WEAR editorial, 18 May 1977.

[21]The station manager, sensitive to the personal attack rule of the Fairness Doctrine, offered to let me or someone else in the class respond to his editorial.

[22]WEAR editorial, 25 May 1977.

[23]WEAR editorial, 27 May 1977.

[24]Pensacola News-Journal, 29 May 1977, p. 3E.

[25]Santa Rosa Free Press, 30 May 1977.

[26]Pensacola News-Journal, 29 May 1977, p. 3E.

[27]Pensacola News-Journal, 29 May 1977, p. 6B.

[28]WSRE Newscast, 22 March 1978.

[29]Pensacola Journal, 23 May 1977, p. 4A.

[30]Ed Stanford, past president of the Christian Business Men's Committee and the one responsible for the ad being placed, expressed his views further in a Tampa newspaper article. Philip Morgan, "'Deep Throat' Fuss Festers," Tampa Tribune and Tampa Times, 12 June 1977, pp. 1-A & 28-A.

[31]John Wingard, personal letter, 20 May 1977.

[32]Anonymous letter, received 27 March 1978.

[33]W. B. Oakes, personal letter, 1 June 1977.

[34]Chrys S. Holley, letter to President Robinson, 23 May 1977.

[35]Ibid.

[36]Student Council Memorandum, 12 May 1977.

[37]Mary Barrineau, "UWF President Calms Faculty Freedom Fears," Pensacola Journal, 19 May 1977, pp. 1B & 3B.

[38]Ibid.

[39]Marshall M. Criser, personal letter, 24 May 1977.

[40]E. W. Hopkins, Jr., personal letter, 27 May 1977.

[41]Mary Barrineau, "'Deep Throat' Showing 'Bad Judgment'," Pensacola News, 26 May 1977, p. 1A.

[42]United Faculty of Florida press release, 26 May 1977. Most of the material in the press release was published in an article the following day. Mary Barrineau, "Regent Criticizes 'Deep Throat' Showing," Pensacola Journal, 27 May 1977, pp. 1A & 14A.

[43]Letter to Marshall M. Criser, 4 June 1977.

[44]Mary Barrineau, "Showing of Porn Film Morally Wrong--Fortune," Pensacola Journal, 17 May 1977, p. 1A.

[45]SB 1230, Florida Legislature, 1977 (The bill would create s. 240.146, Florida Statutes).

[46]"House Votes to Allow Censorship on Campuses," Pensacola Journal, 24 May 1977, p. 1A.

[47]Mary Barrineau, "Mock Sex Act Spurs Campus Censorhsip Bill," Pensacola Journal, 1 June 1977, p. 1B.

[48]Mary Barrineau, "Student Denies Sex in Scene from 'Equus'," Pensacola News-Journal, 5 June 1977, pp. 1B 7 4B.

[49]Pensacola Journal, 1 June, 1977, p. 8A.

[50]John Hanchette, "Censorship Opposition Mounting," Pensacola Journal, 25 June 1977, p. 1B.

[51]Ibid.

[52]Mary Barrineau, "United Faculty Calls for Veto," Pensacola News, 3 June 1977, pp. 1A & 2A.

[53]Letter to Governor Reubin Askew, 28 June 1977.

[54]Ibid.

[55]Pensacola Journal, 7 June 1977, p. 10 A.

[56]St. Petersburg Times, 30 June 1977, pp. 1B & 2B.

[57]Chet Kaufman, "Roberts Wins Grievance on Letter," Pensacola Journal, 2 September 1977, pp. 1B & 4B.

[58]Memorandum to Arthur H. Doerr from Lucius F. Ellsworth, 7 September 1977.

[59]Mary Barrineau, "No Charges Pressed in Film Controversy," Pensacola News, 17 May 1977, pp. 1A & 2A.

[60]Mary Barrineau, "Golden: Film Clip 'Hard-Core' Porn," Pensacola Journal, 14 May 1977, pp. 1A & 4A.

[61]University officials had indicated through their attorney that they would not pursue the matter. Likewise, a request from the chairman of the University of West Florida Faculty Council to the chairman of the Board of Regents for legal assistance in my behalf went unheeded.

[62]Dennis Kaufman, "Deep Throat Obscenity Rule Expected Today," Pensacola Journal, 21 March 1978, pp. 1 & 2.

[63]Ibid.

[64]Ibid.

[65]Monde Murphy, "Bell Rules 'Deep Throat' Obscene," Pensacola News, 31 March 1978, p. 1A.

[66]Brief Amicus Curiae of the American Association of University Professors, filed in Roberts v. Florida, Case No. 54, 135, pp. 16 & 17.

[67]Bill Kaczor, "State Concedes 'Deep Throat' Could be Used Educationally," Pensacola Journal, 23 December 1978, pp. 1C & 2C.

[68]Roberts v. Florida, 373 So 2d 672 Fla. (1979).

[69]Appellant's Reply Brief, filed in Roberts v. Florida, Case No. 54, 135, pp. 5 & 6.

[70]Roberts v. Florida, p. 675.

[71]Hanover, "Deep Throat Obscenity Rule Expected Today," p.2.

[72]Although the litigation had been emotionally taxing, it did not produce a serious financial strain. My attorneys, George Estess and Fletcher Baldwin (the latter a constitutional law scholar who helped argue the case before the Florida Supreme Court), did not charge for their services. Money raised from legal defense funds (one initiated by University of West Florida faculty; another supported by the Speech Communication Association) and a donation of $500 from the Playboy Foundation were used to pay for various expenses (mainly travel) which we incurred.

[73]Criser, personal letter.

[74]Mary Barrineau, "Schools Survey Ranks UWF Last in 2 Areas," Pensacola Journal, Gulf Coast Section, 25 July 1978, p. 1.

THE SUPREME COURT AND THE FIRST AMENDMENT: 1980-1981

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I. Stewart's First Amendment Legacy

After twenty-three years on the Supreme Court bench Potter Stewart is gone. He will not be remembered as a great justice, but his support of a vigorous and free press will not soon be forgotten. Justice Stewart, an Eisenhower appointee, was a moderate with conservative leanings who more often sided with the more conservative Justices Rehnquist and Burger than the more liberal Brennan and Marshall. But in the area of First Amendment rights of a free press he cast crucial votes and wrote forcefully about expression rights that will receive considerably less respect if the Reagan appointees are more attracted to the conservative camp.

In the 1971 Pentagon Papers case Stewart along with five colleagues upheld the right of two newspapers to publish a classified study of the Vietnam War despite the Nixon administration claims that national security would be damaged. Of these six justices only the aging Brennan and the less than robust Thurgood Marshall remain on the bench. The survivor of future competition between the executive branch and an unrestrained press rides, in part, on the first Amendment philosophy of Stewart's successor.

Two cases particularly provided Potter Stewart with a forum for his views in regard to a free press. When in Pittsburg Press v. Pittsburg Commission on Human Relations, 413 US 376 (1973), the Court held that sex discriminatory advertising, illegal under existing law, was therefore unprotected expression and could be constitutionally restrained, Stewart protested that "no government agency in the Nation has any such power" to tell a newspaper in advance what it can and cannot print. Stewart contended "that government must never be allowed to lay its heavy editorial hand on any newspaper in this country." He admonished his fellow justices for treating the First Amendment as no more than a set of values to be balanced against other values and took the position that the Amendment will remain in grave jeopardy until it is no longer competing with the "quality of life," "total community environment," "public safety," "obligations to the administration of justice," or other subordinate values.

In Branzburg v. Hayes, 408 US 665 (1972), the Supreme Court held that forcing testimony from a newsman before a grand jury does not abridge a free press. Newsmen were given no First Amendment right to protect their sources when impairment to the administration of justice was perceived as the consequence. Potter Stewart called this a "crabbed view" of the First Amendment and a "disturbing insensitivity" to the critical role of an independent press. The interest in source confidentiality offered for First Amendment protection in this case was not, he urged, antagonistic to but complimentary toward achieving justice and deserved "great breathing space."

It remained, however, for a case not involving the press to provide Potter Stewart with perhaps the clearest issues enabling him to articulate his philosophy about the First Amendment. In Young v. American Mini Theatres, 427 US 50 (1976), he wrote in his dissent that objectionable material does not diminish its protected status. Selective interference with speech content thought to produce distasteful effects is intolerable. The prime function of the First Amendment he concluded is to guard against just such interference. Stewart continued: "For if the guarantees of the First Amendment were reserved for expression that more than a 'few of us' would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian

limitations on individual liberty."

Young v. American Mini Theatres upheld a community's discriminatory treatment of communication based on the nature of its content. Stewart called this decision an "aberration" because "it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height," and he reminded his colleagues never to forget that "the consequences of vigorously enforcing the First Amendment are frequently unpleasant."

Potter Stewart will be remembered most likely for his oft quoted phrase in Jacobellis v. Ohio where he announced that he can not define pornography but he knows it when he sees it. Fortunately for the First Amendment and its supporters he knew what a free press looked like and in "freedom from prior restraint" he found a definition.

II. In Brief

Although the 1980-1981 Supreme Court year was neither noteworthy for unusual stress on First Amendment activity nor a session that resulted in profound "watershed" decisions about expression, ten cases substantially addressed First Amendment concerns sufficiently to warrant notice. These ten cases resulted in decisions that:

1. it is not unconstitutional, per se, for the media to broadcast from a courtroom (Chandler v. Florida).

2. the First Amendment does not grant individuals the right to force the FCC to review programming change affecting personal viewing and listening preferences (FCC v. WNCN).

3. adoption of a court approved ban on communication that interferes with the formation of a class in a class-action suit unduly restrains communication Gulf Oil v. Bernard).

4. a political party has the right to define its membership, limit the association to those people of its choice, and do so without interference by any state (Democratic Party v. La Follette).

5. the state interest in order and control of crowds, if not subject matter related, is constitutionally supported by a regulation which relegates the sale and distribution of written material to a designated area (Heffron v. Krishna).

6. to prohibit live nude dancing, per se, by commercially zoning it out, violates protected expression (Schad v. Borough of Mount Ephraim).

7. a passport may be revoked from a US citizen whose speech while abroad is found by the Secretary of State to "cause or likely to cause serious damage to the national security or foreign policy of the United States" (Haig v. Agee).

8. a letter box designated as an authorized depository for Postal Service mail does not carry with it a First Amendment guarantee of access to all who seek to use it (US Postal Service v. Council of Greenburgh).

9. both the First Amendment right of Federal candidates to present their views and the First Amendment right of voters to obtain such information outweighs the constitutional rights of broadcasters (CBS v. FCC).

10. a ban on billboard advertising is unconstitutional if it makes exceptions for commercial speech which it presumes to have greater value than the communication of non-commercial messages (Metromedia, Inc. v. City of San Diego).

III. Opinions Rendered

Chandler v. Florida (49 LW 4141)*

In 1965 the conviction of Billie Sol Estes was reversed (381 US 532) by the U.S. Supreme Court because television coverage was found to have prejudiced a fair trial. Now, sixteen years later in a Florida case the Court has again faced the question of whether broadcast coverage of a criminal trial over a defendant's objection is inherently prejudicial.

Two former police officers found guilty of burglary appealed their convictions because, despite their protests, the jury selection, the testimony of the state's main witnesses, and the jury verdict were televised. The coverage was allowed under a state experimental rule, later made permanent, to permit cameras in the courtroom under controlled conditions. The Florida Supreme Court ruled the appeal based on the presence of the broadcast media to be the moot in view of its 1979 decision to permit broadcast coverage on a permanent basis.

On appeal to the U.S. Supreme Court council for the defendants argued that a fair trial and due process were denied by the "mere presence" of TV cameras. Without challenge to the routine methods of press reporting the use of cameras in the courtroom allegedly strained any chance at achieving justice by being inherently prejudicial. The appellants admitted that TV-generated prejudice cannot be measured but claimed that to understand human nature is to understand the negative influence TV can impose, and a behavioral scientist is not needed to tell us the embarrassment which cameras can cause (49 LW 3363).

Without dissent in an opinion delivered by Chief Justice Burger the Court held that Estes v. Texas neither declared all photographic, radio, and television coverage to be an automatic denial of due process nor did the Estes result apply to coverage in all cases under all circumstances. States remain free to experiment with radio, still, and TV coverage of their courts as the technology of communication evolves. An absolute ban on trial coverage by the broadcast media is unjustified, said the Court, merely because there is a danger that the nature of the coverage may impair juror ability to render judgment uninfluenced by extraneous matter. Burger noted that in this case no evidence was offered that broadcast coverage "subtly tainted" the trial, nor was there emperical data to suggest that the broadcast media has an adverse effect on the in-court judicial process under all circumstances. Absent a demonstration of prejudice having constitutional dimensions the Court was not inclined to upset a state court judgment without more than a presumed violation of an alleged right based on nothing more than a supposedly inherent condition of unfairness.

*Official U.S. case citations for the 1980-1981 Supreme Court term do not appear because they are assigned subsequent to the preparation of this article.

Thus the Chandler decision represents, subject to review, judicial toleration of new programming possibilities, opportunities for innovation, and a chance for audiences to see, hear, and know aspects of a judicial system previously accessible to relatively few. No longer do radio-TV broadcasters and judges have to suffer apprehensions that in-court media coverage may be declared automatically unconstitutional. The burden now is on the objector to show how an otherwise free press should be banned to prevent an unfair trial resulting from domonstrated causality between the presence of cameras and the inability of jurors to make decisions independent of media influence.

While participants in judicial proceedings now have a weaker constitutional position from which to argue against reasonable coverage and while media access is strengthened, the opening of courtrooms to microphones and cameras is not absolute. The Supreme Court has specified possible circumstances that could justify excluding the media's trade tools from the courtroom. If the accused's awareness of coverage affects the fairness of the trial, if coverage can be proven to have a psychological impact on the accused, if a broadcast is perceived as punishment before guilt is determined, if on appeal the defendant can show that media coverage compromised the ability of the judge to respond fairly, and if a defendant can demonstrate that an unsequestered jury has been exposed to sensational coverage, then the constitution will on balance favor support of the Sixth over the First Amendment.

While the above noted opportunities for limiting the Chandler decision require emperical evidence of substantial and invariable prejudice, the broadcast media nevertheless must exercise skill, good taste, and restraint if Chandler case gains of a courtroom open to live public scrutiny are to be preserved.

Federal Communications Commission v. WNCN Listeners Guild (49 LW 4306)

The Communications Act of 1934 empowers the Federal Communications Commission (FCC) to renew or transfer a radio broadcast license if in the judgment of the FCC "the public interest, convenience, or necessity" will be served by the FCC action. Pursuant to this authority the FCC issued a Policy Statement to the effect that the public interest is best served when market forces and broadcaster competition influence a radio station's entertainment formats. Consequently the FCC did not feel compelled to review a station's format changes.

A citizens group, concerned because their program listening preferences were not being favored, petitioned the federal court to review the Policy Statement. On review a lower court found that the FCC reliance on market forces to develop diverse programming was an unreasonable interpretation of the "public interest" standard, and that the FCC could not ignore that a program format change might so affect the public interest that a hearing was required.

In a 7-2 decision written by Justice White the Supreme Court found the Policy Statement not inconsistent with the Communications Act and a permissible means by which to implement the "public interest" standard. The Court held that the FCC offered a rational explanation for reliance on market forces instead of governmental review of entertainment programming. Unnecessary restrictions on licensee discretion were to be avoided by the FCC which is privileged to weigh and determine those policies which best meet the "public interest" requirements. Justice White concluded that the Policy Statement does not conflict with the First Amendment rights of listeners, "since the FCC seeks to further the interests of the listening public as a whole and the First Amendment does not grant individual listeners the right to have the FCC review the abandonment of their favorite entertainment programs."

Gulf Oil Company v. Bernard, (49 LW 4604)

In a class action suit Gulf Oil Company and one of its unions at a Texas refinery were sued for racial discrimination in employment. The Supreme Court granted certiorari to clarify the scope of a District Court's authority

to limit communication between the plaintiffs and prospective class members. The District Court order stated "that if any party or counsel asserted a constitutional right to communicate without prior restraint and did so communicate he must file a copy of the communication with the court." A divided panel of the Fifth Circuit Court of Appeals held that the order was not prior restraint because it exempted unapproved communications "whenever the parties or their counsel asserted a constitutional privilege in good faith." The Fifth Circuit in a hearing en banc (13 judges joined in the majority opinion) held that the District Court order unconstitutionally restrained expression protected by the First Amendment. They found no justification for an overbroad restraint which was not accompanied by procedural safeguards.

Justice Powell delivered the opinion of a unanimous Supreme Court which concluded that "the mere possibility of abuses in class action litigation does not justify routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Federal Rules." The District Court without identifying anything that it thought improper and without offering a reason, banned a communication that encouraged employees to rely on the class action suit for relief and to reject Gulf's offer. Powell contended that court reliance on verbatim procedures in a manual for litigation was unjustified in view of more appropriate and less burdensome remedies.

Democratic Party v. La Follette (49 LW 4178)

Wisconsin election laws permit voters to participate in the Democratic Presidential Preference Primary without publicly declaring a party preference. State law mandates that the results of the primary shall determine the allocation of votes cast by the state's delegates at the Democratic National Convention. Democratic Party rules forbid anyone who does not publicly affiliate with the party to participate in the process of selecting delegates to the Party's national convention. Consequently, when the Party declined to seat Wisconsin delegates at the 1980 Party convention, Wisconsin brought action against the Party and the Democratic National Committee to force the seating of the State's delegates. The Wisconsin Supreme Court found the delegate selection process constitutional and binding on the Democratic Party.

Justice Stewart for a divided Supreme Court held that Wisconsin cannot compel the seating of a delegation chosen in a manner which violates Party rules. Under the First Amendment, Stewart wrote, the Party has by right of political association to identify the people and limit the association to those people of its choice, free from state interference. Wisconsin's preference for an open primary to assure a secret ballot, increase voter participation, bring integrity to the electoral process, and prevent voter harrassment was found to be germaine to the preference primary but not pertinent, through an independent process, to the imposition of voting requirements on delegates selected later. The issue was not whether Wisconsin can conduct an open primary but whether the results of such a primary can be made binding on the delegates and the Party. The Court majority concluded that they could not. Thus, this "substantial intrusion" by the State into First Amendment protected associational freedom was not allowed. Justices Powell, Blackman, and Rehnquist in their dissent criticised the Court for acting "without any serious inquiry into the extent of the burden on associational freedoms and without due consideration of the countervailing state interests.

Heffron v. International Society for Krishna Consciousness (49 LW 4762)

A rule governing the operation of the Minnesota state fair provides that "sale or distribution of any merchandise, including printed or written material, except from a duly licensed location on the fairgrounds shall be a misdemeanor." The regulation does not prohibit organizational spokesmen from communicating their organization's views in face-to-face discussion while walking about the fairgrounds. Space from which to distribute or sell anything must be rented in a nondiscriminatory manner, and this applies to nonprofit, charitable, and

commercial enterprises alike. A Krishna religious group sued Minnesota state officials claiming that the regulation violates their First Amendment rights to go into public places and practice their religion which requires the sale and distribution of literature and the solicitation of donations to support their cause. The Minnesota Supreme Court reversed a lower court which had upheld the constitutionality of the rule. Justice White delivered the majority opinion which was dissented from, in part, by four of the nine justices. This opinion reversing the Minnesota Supreme Court upheld the prohibitory rule because it is not based on the content or subject matter of speech. It applies in a non discriminatory way to all who would see or distribute material or solicit funds, and it is not by its nature an invalid time, place, and manner restriction that enables suppression of a particular point of view. Because a fairgrounds is a small area with a high incident of goods, services, and entertainment provided to large crowds on a temporary basis, White contended that the state has substantial interest in maintaining order and control over such an activity. To use less restrictive means such as punishing disorder, limiting solicitors, and tightening restrictions on movement was ruled inadequate to deal with the problems posed by a large number of distributors and solicitors. The Krishna's were not by the regulation prevented from carrying on in their own way outside the fairgrounds nor were they banned from the fairgrounds. They, according to the Court majority, "may mingle with the crowds and orally propagate their views;" and with the acknowledged constitutionality of the fair rules they can also arrange for a booth from which to distribute and sell literature and solicit funds without any right to protected expression having been breached.

Schad v. Borough of Mount Ephraim (49 LW 4597)

Schad and others were convicted for exhibiting live (usually nude) dancing in violation of an ordinance that restricted activity in a commercial zone. The trial court with appellate court support recognized that live nude dancing is protected by the First Amendment but rejected any First Amendment defense as inapplicable since the ordinance zoned out all forms of live presentation.

The Supreme Court in an opinion delivered by Justice White with Justices Burger and Rhenquist dissenting reversed the lower courts for tolerating the plaintiff's failure "to justify the exclusion of live entertainment from the broad range of commercial uses permitted in the borough." Entertainment programs are not to be prohibited for displaying a nude human figure; and nude dancing, per se, is no less protected from official regulation. To exclude a broad category of protected expression from permitted commercial uses was not sufficiently justified. Allegedly related problems such as parking, trash, police protection, and medical care were not jusifiably distinguished as unique to live entertainment as distinct from other permitted commercial uses. The incompatibility of live entertainment with the permitted uses was unsupported. White concluded that although local zoning and land control is necessary to achieve a satisfactory quality of life, "the zoning power is not infinite and unchallengeable; it must be exercised within constitutional limits." The Borough breached those limits.

Justices Burger and Rehnquist contended in their dissent that the Borough was merely and properly seeking to be the "masters of their own environment" as they sought to preserve "the basic character of their community." Even nude dancing as protected speech under the First Amendment can be permissibly regulated. The Supreme Court, they argued, should not force the towns and villages of this nation into a Court-created mold. They reasonsed it to be "sheer nonsense" to "trivialize" and "demean" the First Amendment by upholding a right to impose every form of expression on every community.

Haig v. Agee (49 LW 4869)

Philip Agee, a US citizen and former employee and outspoken critic of the Central Intelligence Agency (CIA) has attempted to fulfill his stated goal of disrupting the CIA by identifying their undercover operatives throughout the world. Agee, a resident of Hamburg, West Germany, had his US passport revoked pursuant

to a federal law which permits revocation when the Secretary of State determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. Agee conceded that his efforts to damage national security or foreign policy were within the prohibitions of the regulations but that the Secretary of State lacked the authority to use the regulation under which his passport was revoked and further violated his freedom to travel and his First Amendment right to speak out against his government's policies. The lower courts ordered Agee's passport restored since Congress had neither expressly nor by implication granted the Secretary the authority that he exercised.

Justice Burger spoke for the Court majority (7-2) when he reversed the lower courts and supported the revocation of Agee's passport. Burger held that the Secretary of State can deny a passport for reasons unstated in the statutes and therefore he may revoke on the same grounds. Burger contended that beliefs and conduct can be separated in their protection, and beliefs represented by speech are only part of Agee's campaign which, when considered together with his conduct, "presents a serious danger to American officials abroad and to the national security." Burger countered the claimed protection of the First Amendment by noting that the right to hold a passport is legitimately subordinate to national security. If revocation inhibits Agee, it is an inhibition of his action, not his speech.

Justices Brennan and Marshall joined in a dissent which regarded this case as "a prime example of the adage that 'bad facts make bad law'." Philip Agee, hardly a model US citizen, nevertheless, according to the dissent, should be protected by a Constitution which protects unpopular as well as popular speech. This decision "applied not only to Philip Agee, whose activities could be perceived as harming the national security, but also to other citizens who merely disagree with government foreign policy and express their views" Brennan and Marshall concluded that too much of the lawmaking function allocated to Congress is surrendered to the Executive by this decision.

US Postal Service v. Council of Greenburgh (49 LW 4813)

By federal law the deposit of unstamped mailable matter in a Postal Service approved letter box is prohibited. The Greenburgh Civic Association was notified by a local postmaster that its practice of delivering unstamped notices in the letter boxes of private homes violated this law. The Civic Association sought injunctive relief against this prohibition by claiming their speech and press freedoms were denied by enforcement of this unconstitutional law. The lower court agreed that First Amendment rights were denied the Association and enjoined the Postal Service from enforcing the law.

Justice Rehnquist, who delivered the opinion, joined with six other Supreme Court justices to support the Postal Service action by finding nothing unconstitutional about the law or its application in this case. Rehnquist argued that a letter box as an authorized depository of mail, even though owned by the postal customer, does not by its nature become a type of "public forum" to which the First Amendment guarantees public access. The efficiency of depositing messages in letter boxes does not carry with it a First Amendment right to do so. Likewise, governmentally controlled property does not guarantee access to that property. Congress has attempted to legislate an efficient postal system and, according to Rehnquist, did not legislate against leaflet distribution and should not have to defend in each and every locale the "time, place, and manner" non-content-oriented test as inherent in the creation of an extensive national postal system with regulations of a general character. The court majority reiterated the long recognized validity of time, place, and manner regulations over expression providing such regulations are "content neutral, serve a significant government interest, and leave open adequate alternative channels for communication." The First Amendment in accord with this thinking never meant that "people who want to propagandize their protests or views have a constitutional right to do so whenever and however they please." Rehnquist further concluded that while Congress may not destroy the public forum

nature of streets and parks, a letter box cannot be treated as a street or park.

Justice Marshall's dissent took exception to the loss of control by private persons over letter boxes which they own and provide for mail service. Marshall preferred to support governmental limitation on expression only when necessary to advance a "substantial and legitimate" governmental interest. He opposed the Court majority because in his judgment hand-delivered notices placed in letter boxes by a civic association failed this test.

Justice Stevens' dissent was based on the legal right of homeowners, freed of the prohibition found in a national criminal statute, to decide for themselves whether or not to receive unstamped communications.

CBS v. FCC (49 LW 4891)

Section 312 (a) (7) of the Communications Act of 1934 in conjunction with the Federal Elections Act of 1971 authorizes the Federal Communications Commission (FCC) to revoke a broadcasting station license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." In October 1979 the Carter-Mondale Presidential Committee approached the three networks to purchase 30 minutes of prime time for a political message. All three networks refused because they were not ready to begin airing political programs so far in advance of the election. The Presidential Committee protested to the FCC which in a 4-3 vote ordered the networks to explain how they intended to fulfull their legal obligation to provide "reasonable access" under section 312(a) (7). The networks appealed to the federal courts which upheld the FCC conclusion that the networks failed their obligation to provide broadcast time.

The Supreme Court by a 6-3 vote with Burger and Blackman being joined by Brennan and Marshall said that the FCC has the power to require broadcasting stations to sell prime air time to presidential or congressional candidates. To counter the network's claim that the FCC's requirement violated First Amendment rights by interfering with their editorial discretion to choose what goes on the air, Chief Justice Burger took the prevailing position that both the First Amendment right of candidates to present their views and the First Amendment right of voters to obtain information about candidates outweighed the constitutional rights of broadcasters. Despite the widest journalistic freedom provided the broadcasting industry under the First Amendment the right of the viewers and listeners, not the right of the broadcasters, was held paramount by the Court.

This decision in effect grants to the FCC and political candidates the privilege to decide when an election campaign is under way. That broadcasters are not yet ready to sell time for political programs can be used against them by the FCC as a broadcaster denial of the "reasonable access" requirement of section 312(a) (7).

Justice Stevens dissent lamented that "indeed, anyone who listened to the campaign rhetoric that was broadcast during 1980 must wonder how an impartial administrator could conclude that any presidential candidate was denied 'reasonable access' to the electronic media." The risk, Stevens contended, that the FCC will be biased by the politics involved is impermissible when upholding the FCC right to evaluate the propriety of a network denying a politician air time. The 4-3 FCC decision, he noted, found four Democrats voting in favor of the Carter-Mondale request and three Republicans favoring the networks denial of time to the Democrat presidential committee.

Metromedia, Inc. v. City of San Diego (49) LW 4925)

A San Diego ordinance, with certain exceptions, banned all outdoor commercial and noncommercial advertising in order to eliminate traffic hazards and improve the city's appearance.

The Supreme Court, unable to agree on the rationale for their decision, nevertheless struck down the ordinance. Justice White, supported by three other justices, concluded that the ordinance complied with previously announced commerical advertising standards, Central Hudson v. Public Service Commission, 447 US 357 (1980); but it failed to apply the exceptions provided commercial speech to noncommercial speech as well. Justice White held: "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." Justices Brennan and Blackman relied on yet another First Amendment analysis. They contended that the ordinance was a total ban on billboards which could be permitted only if the city could show "a sufficiently substantial governmental interest is furthered by the ban, and that a more narrowly drawn restriction would not suffice."

Chief Justice Burger, joined by Stevens and Rehnquist, dissented by calling it "frivolous" to suggest that an ordinance designed to prevent traffic risks and environmental blight could infringe on freedom of expression.

IV. Cases Disposed Without Hearings

(The Supreme Court took action that in each of the following cases resulted in allowing the holding of the lower court to prevail except in those instances that are noted otherwise.)

OBSCENITY

ISSUES: Does the use of "indecent" language over the telephone violate a state obscene-telephone-call statute? Can a telephone call using "vile gutter language" amount to the invasion of a substantial privacy interest and thus be expression unprotected by the First Amendment? (Certiorari denied. Hatt v. Indiana, 400 NE2d 206, 49 LW 3518)

LOWER COURT: A statute which prohibits appearing nude in a public place is not unconstitutional for being overbroad since overbreadth depends on the asserted rights being First Amendment rights. Dancing nude in bars and taverns is conduct, not speech, and thus does not violate the First Amendment. ISSUE: Does a statute barring females from appearing nude in a public place violate the First Amendment for being overbroad? (Appeal dismissed. Dove v. Indiana, 397 NE2d 580, 49 LW 3107).

ISSUE: Does the First Amendment permit conviction for distributing obscene films when police, without a warrant, seize them and for eight days review 345 films "without seeking judicial determination of obscenity or probable cause"? (Certiorari denied. Blews v. Florida, 49 LW 3500).

ISSUE: Does it violate free speech rights to revoke a theatre operator's license solely because the licensee exhibited nonobscene erotic films? Is an ordinance unconstitutional when it discriminates between motion picture theatres on the basis of content and retroactively punishes that which was permissible when licensed before enforcement of the ordinance? (Certiorari denied. Walnut Properties, Inc. v. Long Beach City Council, 49 LW 3064.

ISSUE: Does a local ordinance (upheld by the lower court), which bans establishments in which members of one sex massage, body rub, and bathe members of the other sex, violate the First Amendment rights of assembly, association, and privacy? (Certiorari denied. Wigginess, Inc. v. Fruchtman, 49 LW 3065).

ISSUES: Can films be evaluated for obscenity as a whole when the jury views them three at a time? Is a warrant overbroad and constitutionally invalid when it authorizes seizing not only allegedly obscene film but projectors used

to disseminate protected expression? (Certiorari denied. U.S. v. Johnson, 626 F2d 753, 49 LW 3843).

ISSUES: Is the First Amendment violated by a statute which declares material obscene if its distribution commercially exploits erotica for the sake of prurient appeal? Is it unconstitutional for a statute to authorize convictions for constructive rather than actual knowledge of the obscene contents of a film in a theatre? Does the mere presence of an employee in an adult movie theatre constitute knowledge of the contents of films in fulfillment of constitutionally mandated scientific requirements? (Dismissed. Showcase Cinemas, Inc. v. Georgia, 49 LW 3767).

ISSUE: May a liquor license be suspended solely because the licensee permitted nude dancing on the premises? To assure that protected expression is not violated must the state show that nude dancing constituted more gross sexuality than communication and that such dancing could induce misconduct properly regulated by the state? (Appeal dismissed. Barmat v. Robertson, 611 P2d 101, 49 LW 3198).

LOWER COURT: The court denied review to an alcoholic beverage control department ruling that a liquor license should be suspended because the licensee permitted nude performance on his premises. ISSUE: Are the licensee's First Amendment rights of expression violated by the ruling when no compelling state interest or clear and present danger can be demonstrated to exist? (Certiorari denied. Tran Con Corp. v. Alcoholic Beverage Control Appeals Board, 49 LW 3313).

LOWER COURT: Under a municipal ordinance the obscenity conviction of a movie projectionist in a municipal court without a jury and later in a circuit court with a jury was affirmed. ISSUE: Is a jury trial required in the first instance to resolve the issue of contemporary community standards, and was the defendant discriminated against when he suffered a more severe penalty by exercising his right to a circuit court jury trial? (Certiorari denied. Howell v. City of Birmingham, 383 So2d 567, 49 LW 3272).

ISSUES: May surveys, expert testimony, and other locally sold magazines similar to the one in question be introduced in an obscenity trial as evidence of community acceptance? May a trial court constitutionally exclude relevant evidence of community standards which directly affects the issue of obscenity? (Certiorari denied. Flynt v. US, 49 LW 3010)

SHIPS

ISSUE: Does a federally subsidized shipping line violate the First Amendment right to freedom of association when it discharges deck officers for their refusal to join an uncertified union of deck officers? (Certiorari denied. Jensen v. Farrell Lines, Inc. 625 F2d 379, 49 LW 3569).

GOVERNMENT PERSONNEL

LOWER COURT: A supervisor of a county employee violated the employee's First Amendment rights when he restricted his working hours and then discharged the employee for non-compliance with scheduled working hours. The employee sought to deliver a speech to the county commissioners on homosexual rights, and this act was found to be a substantial and motivating reason for the discharge. ISSUE: "Does an employee have a constitutional right to make a speaking appearance before a governmental body for his own personal purposes at employer's expense?" (Certiorari denied. Gray v. Van Ooteghen, 628 F2d 488, 49 LW 3691).

MUNICIPALITIES

ISSUE: Does a municipal ordinance (upheld by the lower court) that limits and extensively regulates portable display signs deny freedom of speech to the owners and operators of commercial property? (Certiorari denied. Thomas v. City of Marietta, Ga., 49 LW 3065).

ISSUE: Does a municipal ordinance (upheld by the lower court) that requires removal of billboards within 660 feet of and visible from certain highways violate the First Amendment? (Certiorari denied. Ackerley Communications, Inc. v. City of Seattle, 49 LW 3067).

LOWER COURT: An ordinance regulating solicitation activities violates the First Amendment when a public official can define terminology in a way which allows or disallows licensing. ISSUE: Does an ordinance which exempts from regulation religious groups for "evangelical, missionary, or religious but not secular purposes" violate the First Amendment when it requires a public official to distinguish between "secular" and "religious" activity. (Certiorari denied. Rusk v. Espinosa, 49 LW 3669).

ISSUE: Does a city ordinance violate the First Amendment as held by the lower court, when it bans sale or lease signs from residential property? (Certiorari denied. Baltimore v. Crockett, 49 LW 3650).

LIBEL

ISSUE: Does a court err by refusing to grant a First Amendment right not to disclose the identity of a confidential news source during a pretrial hearing in a media libel case involving a public figure? (Certiorari denied. Transamerican Press Inc. v. Miller, 621 F2d 721, 49 LW 3669).

SCHOOLS

LOWER COURT: The First Amendment rights of a university political science professor are violated when he is denied tenure and promotion because of contacts with the CIA. The case was remanded to determine if similar dismissal action would have been taken independent of any association with the CIA. ISSUE: Does covert association with the CIA, unrelated to functions as a college professor, constitute protected association under the First Amendment? (Certiorari denied. Berkowitz v. Selger, 629 F2d 809, 49 LW 3732).

LOWER COURT: Freedom of speech and assembly is violated by a trespass conviction for distributing and selling political materials in a reasonable manner on a private university campus. ISSUE: Does Princeton University have a right to control expressive activity by strangers on its campus? (Jurisdiction postponed. Princeton University v. Schmid, 423 A2d 615, 49 LW 3846).

LOWER COURT: Threats from a state university to discipline faculty critical of an administrator's policies warrant injunctive relief for restraint on First Amendment rights. ISSUE: Do the faculty members of a state-related university have the burden of proving that their expression was not so disruptive that it lost First Amendment protection? (Certiorari denied. Lincoln University v. Trotman, 635 F2d 216, 49 LW 3846).

LOWER COURT: The First Amendment was violated by dismissal of a tenured professor at a state university for his inaccurate hearsay statements made privately to those responsible for appropriation recommendations for state agencies. ISSUES: Does the repetition of unverified, improbable, and untrue rumor constitute such reckless disregard for the truth that the communication fails to qualify for First Amendment protection? (Certiorari denied. Adams v. D'Andrea, 626 F2d 469, 49 LW 3589).

LOWER COURT: The suspension of a high school student for calling a faculty member a "prick" does not violate the student's freedom to express himself. ISSUE: Did the lower court properly relay on the Chaplinsky case which established the precedent for not protecting language that inflicts injury or tends to incite an immediate breach of the peace? (Certiorari denied. Mareno v. Walker, 49 LW 3048).

ADVERTISING

ISSUE: Is a real estate advertiser denied First Amendment rights by an administrative regulation which requires those who solicit advance fees to disclose the advertising medium to be used and the number of advertisements to be made? (Certiorari denied. Abdella v. Wisconsin, 49 LW 3469).

LOWER COURT: The First Amendment is violated by a state statute prohibiting signs expressing ideological speech. The statute allowed only signs announcing "the place and time of religious or civic events, election campaign signs, and signs erected by historic and cultural institutions." ISSUE: Can a state statute "prohibiting outdoor, off-premises advertising be invalid on its face because of its potential applicability to non-commercial speech when there was no plaintiff before the court seeking to engage in such speech and when the court gave no consideration to whether the statute could be construed as not applying to such speech." (Certiorari denied. Campbell v. John Donnelly & Sons, 49 LW 3847).

CONSTITUTIONAL LAW

LOWER COURT: The First Amendment is not violated by police restraints which prohibit amplified sound near a Soviet mission, prohibit certain peaceful demonstrations, and which restrict orderly demonstrations to 12 persons in a zoned area across the street and down the block from the mission. ISSUE: Are the First Amendment rights of those who seek to publicize Soviet treatment of Jews violated by the governmental interest in protecting foreign officials? (Certiorari denied. Concerned Jewish Youth v. McGuire, 621 F2d 471, 49 LW 3517.

LOWER COURT: Demonstrations at a shopping mall which included yelling obscenities at patrons and racial slurs at employees were properly banned. ISSUE: Is an injunction which prohibits all speech, handbilling, picketing, and assembly aimed at a boycott so overbroad that it prohibits protected speech? (Certiorari denied. Ad Hoc '78 v. Rouse Philadelphia Inc., 49 LW 3353).

TRADE REGULATION

LOWER COURT: It constitutes unconstitutional prior restraint on commercial speech for a state statute to prohibit preparation and transmission of an investigative report on consumer activity. Also, statutory prohibition of the preparation and transmission of information about "race, religion, color, ancestry, or ethnic origin" was held "unconstitutional content-based restraint on commercial speech." ISSUE: Does a Fair Credit Report Act unconstitutionally impose prior restraint when it prohibits the publication of investigative reports and the transmission of personal information? (Certiorari denied. Cohen v. Equifax Services Inc., 420 A2d 189, 49 LW 2229).

MEDIA

LOWER COURT: A newspaper reporter can be compelled to reveal that a conversation with a source took place even after the source admits to the occurrence. ISSUE: Does an alleged common law reporter-source privilege not to disclose an informant's identity exist when allegedly there is no finding that the revelation is crucial to the defendant's case, alternative sources have not been exhausted, and the testimony sought is merely corroborative of other evidence. (Certiorari denied. Shaffer v. US, 49 LW 3504).

CRIMINAL LAW

LOWER COURT: A California appeals court reversed a trial court which set aside a criminal charge against a Jewish Defense League official who announced that the J.D.L. would reward anyone who killed, maimed, or injured a member of the American Nazi Party. The appeals court found the statement to be an "incitement to imminent lawless action" and therefore unprotected. ISSUE: Is such an utterance protected by the First Amendment? (Certiorari denied. Rubin

v. California, 49 LW 3105.

LOWER COURT: A state statute prohibiting disorderly conduct does not violate protected First Amendment rights when a defendant is convicted for loudly harassing a meter maid. The defendant's conduct was unprotected within the meaning of "fighting words." ISSUE: Is a statute void which provides punishment for "making unreasonable noise" under a description of disorderly conduct? (Appeal dismissed. Mastrangelo v. Pennsylvania, 49 LW 3138).

LOWER COURT: A Florida statute prohibiting felonious extortion did not violate the First Amendment. ISSUE: Does a statute which prohibits utterances which constitute "malicious threats to do injury to another's person, reputation, or property" and which compel one to act against his will infringe on Constitutionally protected speech guarantees? (Certiorari denied. Carricarte v. Florida, 49 LW 3192).

ATTORNEYS

LOWER COURT: The First Amendment rights of a lawyer are not absolute and do not protect him from disciplinary action if he, for political advantage, knowingly utters a falsehood to mislead voters and advantage himself. ISSUE: Is freedom of speech denied to a lawyer who under a state supreme court disciplinary rule is publicly censured for publishing a political ad during a campaign unrelated to the practice of law? (Certiorari denied. Russell v. Kansas, 49 LW 3334).

LOWER COURT: Sanctions by a state bar against an attorney who called a judge's restraining order "highly unethical and grossly unfair" do not violate the First Amendment. ISSUE: Does disciplinary action for a public statement critical of the action of a judge abridge freedom of expression? (Certiorari denied. Herleringer v. Kentucky Bar Assn., 602 SW2d 165, 49 LW 3468).

ALEXANDER SOLZHENITSYN'S APPROACH TO THE PHILOSOPHY AND FUNCTION OF FREE EXPRESSION

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In a letter following his expulsion from the Soviet Writers' Union, Solzhenitzyn warned his literary censors that he and other writers have an inherent human right to free expression. He emphasized: "It is time to remember that the first thing we belong to is humanity, and humanity is separated from the animal world by thought and speech and they should naturally be free. If they are fettered, we go back to being animals."[1] This warning typifies the discourse of this well-known dissident, who is obsessed with free expression and its implications for future societies. A biographer concludes that "he is the champion of an ancient battle for the rights of man in a world that is losing that battle."[2] Critics and admirers call him "prophet," "humanist," "moralist," and "visionary."[3] Reaction from the American press is mixed. Blackburn explains: "When Solzhenitsyn was in the Soviet Union being oppressed like all socially acceptable martyrs, things were fine," but now that he lives in Vermont and attacks the morality of the American press and its legal system, many want to silence him.[4]

An understanding of Solzhenitzyn's approach to free expression is warranted on several grounds. Solzhenitsyn is the most well-known and outspoken of the Soviet dissidents; he represents many who believe free expression should be founded on moral principles; he promotes free expression in multiple genre-novels, essays, letters, lectures, and interviews; he openly criticizes both the American and Soviet policies of free expression; and he proposes innovative solutions that he believes will guarantee more human freedom. For these reasons, Solzhenitsyn's approach is novel, complex, and controversial; it deserves the scrutiny of scholars interested in free speech.

Free expression is a collective term used to describe the First Amendment provisions of religion, speech, press, and assembly. However, since expression is controlled by the State and the Party in the Soviet Union and their major channel of expression is press, the essay will focus more specifically on press than other types of expression. This essay investigates Solzhenitsyn's concept of free expression by (1) reviewing its history in the Soviet Union, (2) explaining the functions of expression in the U.S.S.R.; and (3) presenting the position of Solzhenitsyn as it is developed through his major works.

History of Free Expression in the U.S.S.R.

The Soviet point of view toward free expression reflects the historical changes of its leaders. Prior to the Bolshevik Revolution, expression was controlled by the policies of Czars and the Patriarchs of the Russian church.[5] Subsequent to the revolution, controls on expression fluctuated with the policies of leaders. During the revolution, principles of free press were articulated by Lenin who believed that press should be controlled and owned by the workers and used to serve them. To achieve this end, he converted the two major newspapers--Pravda (meaning "truth") and Isvestia (meaning "news")--into the service of the State and the Party respectively.[6]

Stalin embraced Lenin's assumptions, centralized the control of the press, and adopted stern policies toward censorship. His attitude toward the press was "that of a battlefield commander," and he used it as a "weapon of struggle" and "a means of surveillance."[7] Stalin's Constitution of 1936 acknowledged free expression so that it closely resembled the First Amendment. It states that "citizens of the U.S.S.R. are guaranteed by law: (a) freedom of speech, (b) freedom of press, (c) freedom of assembly and meetings, (d) freedom of street

processions and demonstrations."[8] The Stalin constitution purposely deleted freedom of religion which overtly violated the atheistic principles of Marxist-Leninist ideology. In practice, however, Stalin did not encourage any of these freedoms, but, instead, severely limited them by arrest, imprisonment, torture, and even death for those who dissented from the Party line. In fact, even the slightest negative innuendo toward official policy resulted in arrest and imprisonment during Stalin's regime.[9]

Krushchev became Premier after Stalin's death and promoted free expression an overt means of accomplishing "de-Stalinization," that is, national denunciations of the practices and policies of Stalin.[10] For example, the Soviet leaders publicly stated that the people and the party had gone on "'building socialism' and winning the war in spite of Stalin and 'his distortions'."[11] This liberalized policy gave artists and scientists license to report their negative experiences during the time of Stalin. This "thaw" resulted in a large and active underground press, the birth of liberal journals, and the public presentation of controversial artistic works. Even though the "thaw" was replaced by stricter control at the end of Krushchev's term, Solzhenitsyn believed this period of liberalization made Russians aware of their own history, promoted public sympathy for artists, and resulted in massive circulation and interest in underground publications.[12] These effects persisted through the regime of Brezhnev.

Brezhnev replaced Krushchev and instituted policies of "re-Stalinization," that is, practices characterized by "insistence on ideological purity," "suppression of protests," and "intensified censorship."[13] Under these policies, dissidents were arrested and subjected to public trial, incarcerated in mental institutions, assigned to labor camps, and involuntarily exiled. Additionally, their property was confiscated, they were followed by the K.G.B., and they were publicly condemned in the Soviet Press.[14] Simultaneously, public support of dissidents increased, the underground press flourished, and international pressure was exerted against the Soviet Union. The specific laws used to arrest, imprison, and exile dissidents are the following: Article 58 prohibits conspiracy, spying, or sabotage of the government;[15] Article 70 forbids defamation, agitation, propaganda, or slander of the Soviet Union or Party;[16] and Article 190 prevents the dissemination of anti-Soviet material inside or outside of the country.[17] These violations are the legal principles under which most of the dissidents have been arrested, tried, and sentenced in the Soviet Union; and these laws are also the justification for the censorship imposed by the Soviet Writers' Congress on all publications in that country.[18]

To a large extent, the post-revolutionary history of Soviet leaders chronicles the personal history of Solzhenitsyn.[19] He was born into Leninism and the revolution in 1918 and educated in its ideology in the village of Rostov. In 1941 he joined the military to fight World War II. He served in the Soviet army until 1945 when he was arrested by military police for criticizing Stalin in a letter to a friend. He was charged under Article 58 and sentenced to prison from 1945-1956. Under the leadership of Krushchev and during the "thaw," he was granted a pardon and allowed to teach mathematics and began to work as an underground writer. During Krushchev's liberalization of the arts, he published One Day in the Life of Ivan Denisovich in 1962 and received public praise from the Premier in 1963 for that work. The demise of Krushchev and the rise of Brezhnev instigated re-Stalinzation which, in turn, resulted in seizure and censorship of Solzhenitsyn's manuscripts. He was watched by the K.G.B., expelled from the Writers' Union, discouraged from accepting the Nobel Prize, published works in the underground press and in the West, and lived a secretive and guarded life during 1967-1974. After aggressive resistance through public and private protest, Solzhenitsyn was arrested and forced into involuntary exile in 1974. Since that time, he has lived in Vermont and has become a controversial critic of the American approach to free expression.

Functions of Free Expression in the U.S.S.R.

Obviously then, the U.S.S.R. differs significantly from the U.S. in both law and practice. Since the adoption of the Bill of Rights, U.S. law has guaranteed the right of the individual to express self through religion, speech, press, and assembly. The laws of the U.S.S.R. also stress rights of speech, press, and assembly in their post-revolutionary constitution of 1936; however, they simultaneously adopted more fundamental laws that forced individuals to support the State and the Party. Such laws resulted in different practices of expression. In the U.S., individuals expressed themselves in ways that supported, amended, and even condemned their government and their political parties; whereas Soviet citizens were only heard in the U.S.S.R. when they supported that system.[20]

Even though these systems seem to be posing alternatives, Solzhenitsyn viewed both approaches as politically motivated.[21] He found fault with both systems and instead advocated a non-political system grounded in the truth of art and morality. Solzhenitsyn's approach to the philosophy and function of free expression evolved through several works and a span of nearly eighteen years from 1962-1980.

The functions of free expression are grounded in philosophical assumptions. The assumptions about free expression typically are classified either as utilitarian or moral. The utilitarian position is relativistic and justifies free expression according to its consequences, whereas the moral view is absolutistic and supports its position by universal principles--metaphysical arguments or theological traditions.[22] The Soviet Union adopts a utilitarian position that advocates (1) collectivism, (2) Marxist "truth," (3) totalitarian decision-making, and (4) group dissent.

Collectivism

The Soviet system emphasizes the community or collectivity. Berdayaev notes that Russians value community and the sharing of things in common, that is, the good of the group; and Dostoyevsky considers Russia to have a national personality which "is not a collection of different beings" but "an organized being."[23] More recently, Shafarevich concludes that Russian collectives are marked by their spiritual and moral participation in the life of the group or community.[24] The primacy of the collective over the individual is reflected in policies of censorship. For example, Pasternak was condemned for stressing the individual will of his character "Zhivago" in his Nobel Prize winning book, Dr. Zhivago, rather than stressing the merits of the collectivity.[25] This literary characterization resulted in Pasternak's expulsion from the Writers' Union, censorship of his book, and his "forced" renunciation of the Nobel Prize. Since the collectivity is more important than the individual, the U.S.S.R. convinces its citizens that censorship is justified for the good of the collective, party, state, and community. The legal rationale is that the common good is more impelling than the individual good.

Marxist Truth

In the Soviet Union, truth is found in the theory and practice of Marxist-Leninist ideology. This ideology provides the criteria by which the practices of the collective are judged. For this reason all information that affirms the ideology is encouraged as public communication, and all that is critical of ideology is suppressed by government censors.[26] Since this ideology is the central truth, the people and press frequently condemn religion, capitalism, and participative decision-making. Moreover, all citizens are encouraged publicly to promote the ideology because these are the designated "carriers of values, beliefs and ideals."[27] This pursuit of truth occurs in the law as "Soviet Realism," a policy which allows only that expression which conveys the positive and happy aspects of Soviet life. Any person, media, or group who violates this standard is subject to censorship, arrest, and imprisonment.[28]

Group Dissent

The U.S.S.R. seeks stability by its control of the collective when it promotes Marxist "truth" and maintains the totalitarian rule. Obviously then, Soviet policy discourages individual dissent because it questions the power of the State and the Party. As a result of these values of the collective and Marxism, the dissent of a group is accepted in the Soviet Union rather than individual dissent. According to Tokes dissent occurs when groups of Russians share grievances and provide an organized statement of their demands to the political leadership.[31] While dissent in the United States is provided for in the internal policies of its governments, legal processes, and institutions; dissent in the Soviet Union comes externally and extra-legally from the underground press, Amnesty International, churches, foreign mailings, and international conferences.[32]

Solzhenitsyn views free expression differently than Americans and Soviets. In fact, he aggressively criticizes both approaches. He charges the American system with widespread abuse in the forms of uncontrolled and unmonitored power of the mass media, legal overkill by attorneys and judges, and infiltration and corruption from technology and consumerism.[33] His criticism of the Soviet system is even more damning. He charges it with coercion, lies, enslavement to ideology, and destruction of the Russian culture.

Free expression, Solzhenitsyn believes, should be founded on the God-given right of all human beings to think and speak. But expression should be limited by spiritual values, pure social relations, individual and national sacrifice, and honesty.[34] Critics label Solzhenitsyn's position, "moral idealism," and this approach contrasts with the premises of the Soviet system of expression by questioning collectivism, Marxism, totalitatianism, and group dissent.

Solzhenitsyn's Approach to Free Expression

Since Solzhenitsyn felt himself to be a victim of Russian law and ideology, he made numerous attacks on the Soviet approach to expression throughout his post-prison and public life in the U.S.S.R. The record of these attacks provides insight into both the Soviet system and the thinking of Solzhenitsyn. Since he was an individual, an artist, and a former prisoner of Stalin, he was forced to present his opinions and ideas through letters and essays circulated through the underground and published in the foreign press. This section of the essay analyzes the development of his position on free expression chronologically through several genre. First, the letter of the Soviet Writers' Congress established his personal grievances with the Soviet system of censorship. Second, the dialogue of his characters in the novel Cancer Ward suggested the need for a moral rather than an ideological truth. Third, the Nobel Prize speech specified how literature could be used to speak the "truth" and form the internal consciousness of people. Fourth, his essay From Under the Rubble specified the need for self-restriction and repentance in establishing moral freedom. Finally, the Harvard speech criticized the American approach to free expression and warned that the survival of the American system depended on a new moral foundation.

Letter to Writers' Congress, 1967

Solzhenitsyn wrote this letter after his novel, Cancer Ward, was refused the rights for publication in the Soviet Union by the Congress, that is, the censoring body of the government. While he sent the letter directly to the Congress, he circulated other copies to the editors of major newspapers and journals and secretly to fellow writers. The letter began by defining the action of the Congress as political censorship that "imposes a yoke on literature and gives people unversed in literature arbitrary control over writers."[35] He then linked this incidence of censorship with the "historical mutilation" that great Russian writers of the past have experienced. He concluded by listing harms of

censorship and showing that censorship was a problem inherent to Soviet law and ideology. This letter commenced Solzhenitsyn's bitter attacks on the Soviet system of free expression, stating his grievances and showing the moral harms that resulted for a nation which practiced ideological censorship.

Publication of Cancer Ward, 1968

Although the Soviet Congress denied publication for Cancer Ward, it was published in Frankfurt, Germany, in 1968. The dialogue of the novel often considered issues of free expression.[36] The action of Cancer Ward takes place in the confines of one ward in a cancer hospital in an unnamed city in the Soviet Union in 1955. The novel specifically contrasts the antagonist and pro-Soviet, Rusanov, with the anti-Soviet worker and protagonist, Kostoglotov. All characters in the novel are drawn together in their common circumstance and their desire to be cured from cancer. The theme of the story is that consciousness and choice guard freedom while external and ideological truth impede freedom.

Solzhenitsyn clearly satirizes the policy of "Soviet Realism" in this conversation between Rusanov and his daughter, Avieta, an ambitious Soviet writer. Avieta tells her father: "I don't try any ideological antics" because a writer must abide by ideology. She defends her position by saying "when there are wrong ideas or alien attitudes, it only intensifies the harmful effect of a work." When questioned about the role of truth in literature, she responds that one should never be negative because it is more important to portray the good side of Soviet history and experience. She concludes: "You can speak fearlessly about the good, so that it will become even better . . . . And why should truth be harsh all of a sudden? Why shouldn't it be the shining truth, attractive and optimistic? Our whole literature should be festive."

Later in the novel Solzhenitsyn shows how ideology impedes freedom in a conversation between patients in the cancer ward. One of the patients says that he read about a Communist leader who lived with many material possessions, received his goods through fraudulent means, yet was protected by the government because he was loyal to Soviet politics.[37] A heated debate ensues between the characters about social origins and whether persons can ever overcome their bourgeois consciousness. To make the point that economic changes do not change consciousness Solzhenitsyn portrays Rusanov as a Stalinist ideologue who has learned Marxist jargon but has never internalized its meaning. He contrasts him with the peasant, Kostoglotov, who knows first-hand the perils, suffering, and sacrifice of the worker. Through these and other exchanges, Cancer Ward criticizes ideology and offers personal experience and art as an alternative means to the pursuit of truth.

Nobel Prize Speech, 1970

At the time of the Nobel speech, Solzhenitsyn was expelled from the Soviet Writers' Union for publishing his works abroad and he was attacked by the Soviet press. These factors forced him to remain in the Soviet Union while a stand-in read his speech in Stockholm. The major claim of the speech was that literature has the power to evoke truth even under the oppression of law and ideology. Four supporting arguments developed this conclusion: artists have a responsibility to grasp truth from personal experience; propaganda and science cannot subvert art; literature preserves and protects a nation; and literature can "vanquish the lies" of ideology.[38] More specifically, he warned that "literature transmits condensed and irrefutable experiences. . . . and becomes the living memory of a nation," the source of its internal and spiritual consciousness. He concluded: "Woe to the nation whose literature is cut off by the interposition of force. That is not simply a violation of "freedom of press;" it is "stopping up the nation's heart, carving out the nation's memory." In this speech, he continued to emphasize the need for artistic and moral truth and the power of internal change in opposition to external forces of ideology.

From Under the Rubble, 1974

During the first year of his exile to the West, Solzhenitsyn edited a collection of essays from Samizdat, articles circulated in the underground press. The theme of the collection was "a return to traditional spiritual values--which for the most of them meant those enshrined in Christian teaching--as a necessary condition for a regeneration of the country's intellectual, cultural, and social life."[39] Solzhenitsyn carefully outlined the religious principles for freedom--self-restriction, sacrifice, repentance, forgiveness, and reconciliation.

This moral foundation began in the "Christian definition of freedom." Freedom is self-restriction, that is, self-restraint of the individual for the sake of the collective. He explained that Russia had sinned and that it must seek change by repentance for "the nation is mystically welded together in a community of guilt, and its inescapable destiny is common repentance." Through personal and national repentance, Russia can be redeemed from its guilt and "the air and soil of Russia be cleansed so that a new and healthy nation can grow up." Repentance should be followed by self-limitation, "a restriction of self for the sake of others." This produces inward development and a moral foundation for freedom. Moreover, this spiritual renewal should be accompanied by a rebirth in the power of the church and a decentralization of the government to more rural and agricultural communities. All of these factors, Solzhenitsyn believed, could and should be introduced into the Soviet Union to ensure his utopian view of freedom founded on moral principles and a benevolent authoritarian government.

Harvard Commencement Address, 1978

By the time of the Harvard speech, Solzhenitsyn was residing in Vermont and writing a comprehensive history of the Russian people. In the speech he overtly criticized the American system of free expression by showing that Americans lacked moral courage and placed their faith in the pursuit of material goods and free enterprise.[40] This resulted, Solzhenitsyn said, in the legal system and the press usurping the power that belonged to the people and their representatives. Instead of this "faulty system of values," he proposed that Americans should adopt a moral vision that transcends economic and legal authority and guides free expression through "man's sense of responsibility to God and society." Solzhenitsyn's approach evolved from a critique of censorship in the U.S.S.R. into artistic and moralistic solutions, and eventually into a statement of a moral vision which he believed should replace all systems of expression based on political ideology.

Summary

The effects of Solzhenitsyn's proposals for free speech in Soviet society are not easy to evaluate. He certainly was one of the first and the most aggressive of all dissidents. He has given courage to other dissidents, compromised the goals of the Writers' Congress, and heightened the awareness of free expression for members of the international community. Time after time Solzhenitsyn was censored and slandered by the Soviet press, and yet he kept up his fight for free expression. Unfortunately, Western reporters contend that little additional freedom has been won as the result of these controversies; however, some dissidents have been released from prison and given exile outside of the Soviet Union, international bodies such as the United Nations have increased pressure against the Soviets, more writers have published their work outside of their country, and both Solzhenitsyn and Sakarov have received the Nobel Prize for their work.

Moreover, Solzhenitsyn has stirred up American response by his assault on the American press in speeches and interviews. Hook writes that he regards Solzhenitsyn's challenge to the American press as "morally valid" even though he uses "a multitude of defects and inaccuracies in his analysis" of Western freedom.[41] Solzhenitsyn continues to arouse the interest in the violations of free expression for Soviets and the international community through a sustained attack on those who repress this human right. He offers idealistic proposals for

those who wish to pursue a moral solution rather than political ones.

Solzhenitsyn's controversial approach to free expression makes him worthy of additional study by persons interested in international differences in free expression. The multitude of novels, letters, debates, and speeches by Solzhenitsyn offer unlimited possibilities for such study. In his role as an advocate for free expression, he has been both aggressive and persistent--sacrificing his reputation, his homeland, and his peace for this cause. In this sense Solzhenitsyn is certainly one of the moral prophets of our time, one who sees the future of the world bound to the ability of its people to express themselves openly in their own society.

Endnotes

[1]Abraham Rothberg, The Heirs of Stalin (Ithaca, N.Y.: Cornell University Press, 1972), p.282.

[2]Giovanni Grazzini, Solzhenitsyn (1971; rpt. New York: Dell Publishing, 1973), pp. 6-7.

[3]Martin E. Marty, "On Hearing Solzhenitsyn in Context," World Literature Today, 53 (Autumn 1979), 580; Walter Kaufman, "Solzhenitsyn and Autonomy," Solzhenitsyn, ed. Kathryn B. Feur (Englewood Cliffs, N.J.: Prentice-Hall, 1976); Richard Lowenthal, "The Prophet's Wrong Message," Detente: Prospects for Democracy and Dictatorship, ed. Aleksandr Solzhenitsyn (London: Transaction Books, 1980); and Alexander Yanov, The Russian New Right, trans. Stephen P. Dunn (Berkely, Ca.: Institute of International Studies, 1978).

[4]Thomas E. Blackburn, "The Inconvenient Solzhenitsyn," National Catholic Reporter, 17, 21 November 1980, p. 11.

[5]Leonard Shapiro, The Government and Politics of the Soviet Union (1965; rpt. New York: Vintage Books, 1967), Ch. 1.

[6]John Hohenberg, Free Press, Free People (New York: Macmillan, 1973), pp. 187-188.

[7]Mark W. Hopkins, Mass Media in the Soviet Union (New York: Pegasus, 1970), p. 74.

[8]Ibid., p. 100.

[9]The brutality of Stalin is recorded in Solzhenitsyn's trilogy Gulag Archipelago I, II, III (Englewood Cliffs, N.J.: Prentice-Hall, 1973, 74, 76 sequentially); and George Saunders, ed. Samizdat: Voices of Soviet Opposition (New York: Monad Press, 1974, part I).

[10]Darrell P. Hammer, U.S.S.R. The Politics of Oligarchy (Hinsdale, Ill.: Dryden Press, 1974), pp. 286-320.

[11]Rothberg, p. 43

[12]Alexander I. Solzhenitsyn and Janis Sapiets, "Interview with Alexander Solzhenitsyn in February 1969, B.B.C.," in East & West, ed. Aleksandr Solzhenitsyn (New York: Perennial Library, 1980), pp. 145-182.

[13]Rothberg, p. 251.

[14]Ibid., p. 169, and Saunders, pp. 358-372.

[15]Rothberg, p. 318.

[16]Hopkins, p. 130.

[17]Rothberg, p. 304.

[18]Ibid., p. 195 and Hopkins, p. 126.

[19]A detailed autobiographical statement of the period from 1966-74 is found in The Oak and the Calf, trans. Harry Willet (New York: Harper and Row, 1979) and a biographical account in Grazzini, ch. 6.

[20]See Shapiro, ch. 1 and Hohenberg, ch. 10.

[21]This point is made repeatedly in Hopkins in various chapters.

[22]Fred R. Berger, ed., Freedom of Expression (Belmont, Ca.: Wadsworth Publishing, 1980), p.3.

[23]Quoted in Vadim Borisov, "Personality and National Awareness," From Under the Rubble, ed. Alexander Solzhenitsyn (Boston: Little Brown and Company, 1975), p. 204.

[24]Igor Shafarevich, "Socialism in Our Past and Future," From Under the Rubble, p. 58.

[25]Rothberg, pp. 32-35.

[26] Laszek Kolakowski, "The New Program of the Communist Party in the Soviet Union," in Essential Works of Marxism, ed. Arthur P. Mendel (New York: Bantam Books, 1961), pp. 371-486.

[27]Hopkins, p. 43.

[28]Derrick Sington, Freedom of Communication (London: Holywell Press, Ltd., 1963), p. 95.

[29]Hopkins, p. 105 and Hammer, pp. 286 ff.

[30]Saunders, pp. 12-14.

[31]Rudolf L. Tokes, Dissent in the U.S.S.R: Politics, Ideology, and People (Baltimore: Johns Hopkins University Press, 1975), p. 19.

[32]Ibid., p. 24.

[33]Alexander Solzhenitsyn, "A World Split Apart," Vital Speeches, 1 September 1978, pp. 676-679.

[34]Alexander Solzhenitsyn, "Repentance and Self Limitation in the Life of Nations," From Under the Rubble, ed. A. Solzhenitsyn (Boston: Little, Brown & Company, 1975), pp. 105-143.

[35]Leopold Labedz, Solzhenitsyn: A Documentary Record (Bloomington: Indiana University Press, 1973), pp. 106-112.

[36]Cancer Ward, trans. Rebecca Frank (New York: Dell Publishing, 1968), ch. 21.

[37]Ibid., ch. 29.

[38]Nobel Lecture, trans. F.D. Reeve (New York: Farrar, Straus and Giroux, 1972).

[39]"Repentance and Self Limitation in the Life of Nations," pp. 105-143.

[40]"A World Split Apart," pp. 678-689.

[41]Sidney Hook, "Solzhenitsyn and Western Freedom," World Literature Today, 53 (Autumn 1979), 573.

THE OPINIONS OF WILLIAM O. DOUGLAS: DEFINING AND DEFENDING FREEDOM OF SPEECH

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Although few people suggest that anyone can say anything at any time in any place, the First Amendment to the United States Constitution is phrased in unqualified terms:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the Freedom of Speech. . .[1]

As the United States Supreme Court addressed free speech cases, the absolute phraseology of the First Amendment was "balanced" against other social ideals (e.g., maintaining peace and good order). In his recent examination of the subject, Bosmajian concluded that:

> Amongst all the Justices who have sat on the United States Supreme Court only one has given his full support to the First Amendment's guarantee of freedom of speech as applied to obscenity and symbolic speech and loyalty oaths and group libel and offensive speech and controversial religious and political speech.[2]

Of the ninety-seven justices who have served our country, William O. Douglas emerges as the foremost persistent and absolutist defender of the freedom of speech guarantees. Appointed to the Supreme Court by Franklin Roosevelt in April, 1939, Douglas' term spanned thirty-six years, the longest term ever by a Supreme Court Justice. When he concluded his term in November, 1976, Douglas' Court career encompassed history that included New Deal responses to the depression, World War II, the McCarthy Era, the economic flourishing of the 1950's, the turmoil Americans suffered through civil rights issues and Vietnam in the 1960's, and the political squalor unveiled by Watergate and similar matters of the 1970's.

In a 1970 survey, sixty-five leading professors of constitutional law, American history, and politics ranked Douglas as one of fifteen "near-greats" among the first ninety-six Supreme Court Justices.[3] Douglas, one of the most colorful and controversial Supreme Court Justices our country has seen, was also one of the most prolific. Overall, Douglas entered judgments in 1,637 cases, of which 49% involved dissent with his colleagues. Douglas wrote the opinion of the Court in 524 cases, concurring opinions in 154 cases, and dissenting opinions in 486 cases.[4] Of the opinions for which he is the primary author, more than seventy-five involve freedom of speech issues.

The purpose of this paper is to explicate William O. Douglas' interpretation of the free speech clause of the First Amendment and to identify the philosophy which guided him in that interpretation. To understand Douglas' position we analyze Douglas-written opinions in three respects. First, we investigate what Douglas meant by the term "speech." Second, since the term "free speech" suggests that not all speech is "free," we investigate what Douglas believed to be permissible limitations on freedom of speech. Finally, as a result of examining Douglas' written opinions, we arrive inductively at several presuppositions constituting Douglas' philosophy of free speech. The third section of the paper describes the Douglas free speech philosophy and its impact on his First Amendment decisions.

I. What is "Speech?"

Freedom of speech debates typically center on what limitations to speech are permissible under the First Amendment. Such arguments presume the answer to a more basic question, "What shall we regard as speech?" Douglas' opinions addressing that question reflect two firm conclusions: 1) "pure speech" is always protected, and 2) the medium of expression is irrelevant. But throughout his career, Douglas continued to be haunted by the issue of what constitutes speech, demonstrated by his continuous efforts to distinguish between speech and acts.

"Pure Speech" Is Always Protected

Douglas' opinions hold that "pure speech" is protected under the First Amendment. Douglas held unrelentingly that any verbalization, whether written or spoken, when not associated with other actions, constitutes pure speech, and thus deserves unqualified protection. Contrary to the Court, Douglas defined libel, obscenity, and leafletting as pure speech. As early as 1947, Douglas argued for the protection of libel as speech.[5] Maintaining his position throughout his career, he argued that, "In my view the First Amendment would bar Congress from passing any libel law, the Alien and Sedition Act (1 Statute 596) to the contrary notwithstanding."[6]

Later, in dealing with obscenity cases, Douglas' reasoning was clear. In Roth v. U.S. in 1957, the Court argued that obscenity is not protected speech, but Douglas argued that deeds, not thoughts, can be regulated, and thus obscenity warrants First Amendment protection.[7] Douglas continued this line of thinking in later obscenity cases: "There is not protection against offensive ideas, only against offensive conduct. . . . 'Obscenity' is at most the expression of offensive ideas."[8] Resting on the distinction between speech and acts, Douglas argued for protection of leafletting in Jones v. Board of Education.[9] Since classes were not stopped nor interfered with, the leafletting was a pure form of expression, unrelated to other actions. Douglas interpreted the First Amendment to guarantee an absence of limitations on freedom of speech; once exceptions are made the amendment is fully vulnerable.

> If "obscenity" can be carved out of the First Amendment, what other exceptions can be created? Is "sacrilege" also beyond the pale? Are utterances or publications with "malice" unprotected? How about "seditious" speech or articles?"

Douglas answered firmly and consistently: "pure speech" is always protected.

Medium of Expression Is Irrelevant

Douglas' opinion in Saia v. New York was the root of a second consistency in Douglas' determination of what constitutes speech. Douglas argued against a statute requiring a police permit for use of a loudspeaker. "Loudspeakers are today indispensable instruments of effective public speech. The soundtruck has become an accepted method of political campaigning."[11] He viewed the medium of expression as irrelevant in determining First Amendment protection. In cases involving diverse media, ranging from motion pictures[12] to upside down display of the flag with a peace symbol taped to it[13] to the singing of protest songs,[14] Douglas argued the medium of expression irrelevant to First Amendment protection. He noted that a medium (speech, radio, stage, the novel, magazines, or film) may have a more powerful effect than others, depending upon the occasion, but that regardless of the medium, the speaker should be "free of the censor."[15]

Separating Speech and Acts

Though striking in his defense of pure speech, regardless of the medium employed, the issue of separating speech from associated acts left Douglas wrestling with a fully absolutist position. He consistently viewed thoughts,

and their manifestations (speech), as safe from regulation. Inflicting punishment for thoughts did not square with the First Amendment.[16] But separating actions from beliefs, conduct from speech, proved to be a more difficult matter.

The issue with which Douglas struggled most of his Court years surfaced in his first dissent with the Court in a free speech case. In Milk Wagon Drivers, Local 753, v. Meadowmoor Dairies, Inc., Douglas joined Justice Black in dissent.[17] In separating picketing as an expression from the potentially violent context in which the picketing occurred, the Court argued that, "Utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force."[18] While accepting the Court's distinction, the dissent cautioned that, "A more convincing demonstration of an immediate threat to the public was necessary before an injunction would be sustained."[19] Douglas agreed with the principle behind the free speech limitation in this case, but sought more stringent guidelines for determining when a situation threatens the public. Thus Douglas began his career as a dissenter and his struggle with a perennial issue.

In Douglas' first authored concurring opinion, also a picketing case, he introduced the beginnings of ". . . what would eventually be his trademark in First Amendment cases -- 'speech brigaded with action.'"[20] While concurring with the Court that picketing, in this case, was protected speech, Douglas allowed the possibility of restricting the actions involved in, or induced by, picketing. He struggled with separating the act of picketing from the dissemination of information about the labor dispute that the act of picketing accomplished. Douglas, and the Court, argued such dissemination as protected speech, but Douglas maintained the possibility of future restrictions:

> Picketing by an organization is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it subject of restrictive legislation.[21]

In cases raising the issues of separating speech from acts, Douglas forged a consistent pattern. In the earlier cases he acted conservatively. He either allowed, in abstract terms, the possibility of placing restrictions on speech brigaged with action or tended to follow the opinion of the Court. In later cases he reversed himself somewhat by shifting from abstractions to specific concrete behaviors subject to limitation but protected all else as free speech. This pattern prevailed in cases ranging from picketing and obscenity to communism.

Milk Wagon Drivers and Bakery Drivers represent cases in which Douglas argued, in the abstract, that speech brigaded with action is open to restriction.[22] In later cases, Douglas constructed more specific criteria. While still allowing the possibility of restricting actions associated with picketing, in Teamsters v. Vogt, Douglas dissented with the Court and became more specific about what could be regulated. Picketing could be regulated ". . . only to the extent that it forms an essential part of a course of conduct which the state can regulate or prohibit."[23] More specifically,

> But where, as here, there is no rioting, no mass-picketing, no violence, no disorder, no fisticuffs, no coercion--indeed nothing but speech--the principles announced in Thornhill and Swing should give the advocacy of one side of a dispute First Amendment protection.[24]

In Communist Party v. Control Board, Douglas again supported picketing unless specified acts occurred.[25] In these and later cases, Douglas protected picketing

since none of the specified restrictable behaviors had occurred.[26]

Cases regarding obscenity also raised the need to separate speech and action. In early obscenity cases, Douglas voted with the Court to protect obscenity as free speech.[27] But in Roth v. United States Douglas dissented, faulting the Court's reliance on the "redeeming social importance" test. Douglas argued that obscenity should be protected ". . . except and unless it can be said that the particular publication has an impact on action that the government can control."[28] He added the abstract principle that "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it."[29] In later cases, Douglas translated the absraction from Roth into more concrete terms.[30] In Memoirs v. Massachusetts Douglas bluntly demanded specific conditions for restricting obscenity: "The Court's contrary conclusion in Roth, where obscenity was found to be 'outside' the First Amendment, is without justification."[31] Regulating obscenity, he argued, requires proof that erotica produces illegal sexual conduct.

In several cases involving Communist Party affiliation, Douglas again relied on the separation of speech and acts to determine his position. In Black v. Cutter (1956) when a union worker was discharged on the basis of his membership in the Communist Party, Douglas in his dissent argued the abstract principle that "Beliefs cannot be penalized consistently with the First Amendment."[32] In Yates v. United States, Douglas noted that speech was not an overt act open to regulation.[33] Douglas later reified his position by specifying those acts that could be regulated. In Beilan v. Board of Public Education, he held that no crime nor treasonable opposition to the country had occurred. Simple membership in the Communist Party constitutes political philosophy but not necessarily action, and ". . . government has no business penalizing a citizen merely for his belief or associations."[34] Douglas specified that, "A teacher who is organizing a Communist cell in a school house or a subway conductor who is preparing the transportation system for sabotage . . ." are engaging in illegal actions, and thus could be held unfit for their jobs.[35] Douglas cites Jefferson's words as grounds for the speech/act distinction:

> . . . that the opinions of men are not the object of civil government . . . that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.[36]

In cases involving picketing, obscenity, and membership in the Communist Party Douglas systematically moved from the abstract to the concrete in his struggle to separate speech and acts. Douglas distinguished between speech and acts in other cases as well.[37] As Douglas developed as a jurist, he resolved many cases by protecting pure speech and a variety of media, and by insisting on separating speech and acts, holding that speech is always protected.

II. Permissible Limitations on Speech

Douglas is often characterized as an absolutist on First Amendment issues. Excerpts from his written opinions add credence to this view:

> The First Amendment is couched in absolute terms -- freedom of speech shall not be abridged.[38]
> The Constitution commands that the Government keep its hands off the exercise of First Amendment rights. . . .[39]
> But under our charter all regulation or control of expression is barred. Government does not sit to reveal where the "truth" is. . . .[40]
> It is difficult--indeed impossible--to read the Constitutional mandate that government "shall make no law" abridging freedom of the press to mean that government "may make some laws" abridging that freedom . . . .[41]

However, the above excerpts are not representative of Douglas' early record on the Court.

Early Douglas Years: Conforming to the Court

Douglas' protectiveness of First Amendment rights evolved over his term, a dramatic change from his early years on the Court. Though known as a dissenter and as an absolutist on freedom issues, Douglas developed that stance in his later Court years.[42] After examining Douglas' early record following his appointment by Roosevelt to the Supreme Court, Powe concluded:

> Thus, the Justice Douglas of the New Deal era and the Justice Douglas of today are not the same, at least with respect to the First Amendment. The Justice has undergone a slow evolution from a willingness to weigh and balance individual rights against governmental powers to an approach bordering on absolutism.[43]

While known for dissenting with the majority opinion, Douglas' role as a dissenter emerged as his term lengthened. During his first seven years on the Court Douglas offered no solely-authored dissents in the free speech area. Douglas' infrequent departures from the Court's majority opinion were expressed by joining the dissent of other justices. Seven times Douglas joined the dissents of other justices. However, three of these dissents did not support free speech.[44] Thus, on three occasions, Douglas took issue with the Court's majority opinion when that opinion favored free speech.

When not joining the dissent of another justice, Douglas frequently concurred silently with the Court's majority opinion. In nine cases, Douglas concurred silently in supporting free speech.[45] As frequently Douglas, by concurring with the Court's majority opinion, failed to support free speech. In Minersville School District v. Gobits Douglas voted to uphold a mandatory flag salute.[46] In Cox v. New Hampshire he concurred with the Court that the state can regulate Jehovah's Witnesses' parades.[47] In Chaplinsky v. New Hampshire he voted with the Court that "fighting words" inciting a breach of peace, are not protected by the First Amendment.[48] In Valentine v. Chrestensen Douglas concurred with the Court that commercial speech is subject to regulation.[49] In National Broadcasting Co. v. United States he joined in the Court's ruling that the use of the airways can be regulated.[50] In Hotel Employees' Local 122 v. Wisconsin Employee Relations Board he joined the Court in upholding a ban against violence on picket lines.[51] And in Prince v. Massachusetts Douglas banned the distribution of literature by the children of Jehovah's Witnesses.[52] In two wartime cases Douglas concurred silently with the Court's majority opinion to uphold curfew limits and evacuation activities leveled at Japanese Americans.[53] The only foreshadowing of Douglas' eventual fervor for protecting speech appeared in seven soley-authored opinions written for or concurring with the Court majority.[54] In these opinions Douglas began to wrestle publicly with free speech issues.

The inescapable conclusion about his early involvement with free speech issues is that Douglas tended to embrace the Court's majority opinion. In twenty-three of thirty-one cases Douglas silently agreed with, concurred with, or wrote for the Court. In these cases, rather than encouraging or restricting free speech per se, Douglas joined the Court's majority opinion whatever its allegiance. In his autobiography, Douglas provides insight as to why he fell prey to the Court's majority:

> Every Justice I have known feels in retrospect that he made mistakes in his early years. The problems sometimes come so fast that the uninitiated is drawn into channels from which he later wants to retreat. That happened to me in the Japanese

> detention-camp case, and to Hugo Black, Frank Murphy and me when the first flag-salute case (Minersville School District v. Gobitis, 310, U.S. 586) was argued on April 25, 1940. In those days, Felix Frankfurter was our hero. He was indeed learned in constitutional law and we were inclined to take him at face value. We voted with him in the opinion holding that the state could subject the children of Jehovah's Witnesses to compulsory flag salute in public schools.[55]

Of the case involving detention of Japanese Americans, he wrote: "I have always regretted that I bowed to my elders and withdrew my opinion . . . ."[56] Embracing the Court's majority opinion in free speech cases, Douglas' early record falls far short of this typical characterization of Douglas:

> No other Supreme Court Justice has argued at such length for the protection of so many different kinds of expression and means of communication.[57]

Emerging Absolutism

The emergence of Douglas' more absolutist free speech position assumed both explicit and implicit forms. Explicitly, 1) he reversed early positions, and 2) he advanced stringent criteria for regulating speech. Implicitly, 1) he limited only hypothetical speech, 2) his limitations on actual speech occurred rarely and in special situations, and 3) his reversals of opinions always favored free speech.

Explicit absolutism. In abandoning or reversing earlier stances, Douglas explicitly protected speech. In Branzburg v. Hayes Douglas discarded the balance test relied on earlier in Chaplinsky v. New Hampshire:[58] "My belief is that all of the 'balancing' was done by those who wrote the Bill of Rights."[59] Though it was not the basis of his opinion, Douglas articulated the clear and present danger test in Beauharnais v. Illinois: "My view is that if in any case public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument. . . ."[60] Later, Douglas denounced this test in Brandenburg v. Ohio:

> Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war I am certain it it not reconcilable with the First Amendment in days of peace. . . . I see no place in the regime of the First Amendment for any "clear and present danger" test.[61]

In addition to abandoning previously acceptable "tests," Douglas reversed several opinions. While upholding a compulsory flag salute in Minnersville School District v. Gobitis,[62] Douglas reversed his opinion in West Virginia State Board of Education v. Barnette.[63] While allowing governmental regulation of commercial speech in Valentine v. Chrestensen,[64] Douglas reversed himself in Cammarano v. United States[65] and Pittsburg Press v. Human Relations Commission.[66] In Communist Party v. Control Board, Douglas agreed that the Communist Party could be compelled to register in the United States and to disclose the names of its officers.[67] He negated this view in DuBois Club v. Clark.[68] Douglas allowed federal regulation of radio programming in National Broadcasting Co. v. United States.[69] He reversed this position in Columbia Broadcasting System v. Democratic National Committee.[70] In abandoning tests and reversing opinions, Douglas widened protection of speech.

Douglas advanced five criteria to determine permissible speech limits. In applying the criteria to speech before the Court Douglas protected speech far more frequently than he restricted it. All speech was protected which satisfied

the first criterion: Is the speech "pure speech?" Applying this criterion in cases involving libel, loyalty oaths, leafletting and speaking before crowds, Douglas supported free speech.[71] The second criterion is Douglas' frequent query: Is the speech so brigaded with illegal action as to be inseparable from it? If so, it was open to regulation. This criterion surfaced in Douglas' first-authored opinion and remained a theme throughout his term. For example, Douglas viewed picketing as speech plus, involving more than mere expression, and thus susceptible to restrictions as to time and place. However, laws regulating picketing usually failed to satisfy Douglas' third criterion: Is the statute narrowly drawn to deal with precise ends? Douglas rejected statutes using "vague or overbroad" terminology on the principle of narrowly drawn limits.[72] Laws were also deemed unconstitutional which conflicted with Douglas' fourth criterion: Is the statute a "prior restraint" on expression? Laws requiring permits to distribute leaflets, speak to groups, picket, as well as statutes banning "obscene" books and movies involved prior restraint and thus failed to satisfy this criterion.[73] Laws were also deemed unconstitutional which conflicted with Douglas' fourth criterion: Is the statute a "prior restraint" on expression? Laws requiring permits to distribute leaflets, speak to groups, picket, as well as statutes banning "obscene" books and movies involved prior restraint and thus failed to satisfy this criterion.[73] When other justices "balanced" speech rights against competing social values, Douglas invoked his fifth criterion: Is the First Amendment right to free speech awarded a "preferred position" over other social values? With free speech preferred over other values, Douglas upheld the constitutional right of active membership in the Communist Party and the withholding of information from grand juries by press reporters.[74] In the end, these five criteria determined the few free speech limitations that Douglas allowed. By abandoning or reversing earlier stances and by advancing criteria that offered a variety of speech First Amendment protection, Douglas explicitly protected speech.

Implicit absolutism. Douglas' emergence to a more absolutist free speech position also assumed an implicit, almost hidden form because at face value Douglas moved in one direction, but in actuality he moved in another. At face value he limited speech; in actuality he argued for a nearly absolutist free speech position. One way Douglas appeared to limit speech is by identifying specific examples of speech which warrant regulation. Douglas stated frequently that speech may be curtailed. However, most of these statements were leveled at hypothetical behavior more extreme than the specific behavior under adjudication. For example, in Feiner v. New York a controversial speech elicited a listener's threats to the speaker. Douglas upheld the speaker's rights, but added, "A speaker may not of course incite a riot any more than he can incite a breach of the peace by the use of 'fighting' words."[75] To publicize an upcoming meeting of the Young Progressives of America, Feiner used loudspeakers atop a large box on a street corner. His remarks allegedly included: "President Truman is a bum;" "The American Legion is a Nazi Gestapo;" and "The Negroes don't have equal rights; they should rise up in arms and fight for their rights." Following the listener's threat to haul the speaker off the box, police ordered Feiner to desist and arrested him when he refused. Douglas argued for Feiner's right to speak and for the police officer's duty to protect speakers.

Douglas followed a similar tack in Dennis v. United States. While he protected teaching of Marxist-Leninist doctrine, Douglas warned that the First Amendment would not protect ". . . teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like. . . ."[76] Douglas allowed the organizing of persons to teach, advocate, or encourage the overthrow or destruction of the government by force or violence but recognized limits to more extreme (though hypothetical) behavior. As in Feiner, Douglas allowed the speech under adjudication but stated clearly that some speech fell beyond First Amendment protection.

Imposing limits on hypothetical behavior emerged as a pattern. While his opinion gave First Amendment protection to a pamphlet, even though it urged students to boycott registration and was "ill-tempered and in bad taste,"

Douglas maintained that, "This does not mean that free speech can be used with impunity as an excuse to break up classrooms, to destroy the quiet and decorum of convocations or to bar constitutional privilege of others to meet together in matters of common concern."[77] While arguing that "obscene" material falls within the scope of the First Amendment, Douglas wrote that "no one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct."[78] While condoning a demonstration on jailhouse property, Douglas cautioned that, "No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally."[79] While arguing for speech protection for an "unfair" report by the press, Douglas offered that the press can be halted if there is ". . . no doubt that the utterances in question are a serious threat to the administration of justice."[80] His opinion supported the access rights of reporters to prison inmates, but Douglas added that, "no one asserts that the free press right is such that the authorities are powerless to impose reasonable regulations as to the time, place, and manner of interviews to effectuate prison discipline and order."[81] While his dissent in Younger v. Harris upheld the petitioner's First Amendment right to distribute leaflets, Douglas suggested that, "If the 'advocacy' which Harris used was an attempt at persuasion through use of bullets, bombs, and arson, we would have a different case."[82] His opinion allowed advocacy for segregation laws in"unseemly language," but Douglas recognized that, ". . . .there might be times and occasions when the legislative or executive branch might call a halt to inflammatory talk, such as shouting of 'fire' in a school or theatre."[83] While protecting a military officer's condemnation of the Vietnam war, Douglas acknowledged that, "A command is speech brigaded with action, and permissible commands may not be disobeyed."[84] In each case Douglas cited examples of hypothetical behavior falling beyond First Amendment protection while at the same time protecting the less extreme behavior under adjudication. Douglas limited speech by way of suggestion only. By limiting hypothetical behavior Douglas argues implicitly for widening, not narrowing, the latitude of protected expression.

Evidence suggests that Douglas sometimes hedged on his previous limits on hypothetical behavior when confronted with similar real behaviors in later cases. In Erznoznik v. City of Jacksonville[85] Douglas made some allowance for public nudity previously limited hypothetically in Roth v. United States.[86] Erznoznik involved a drive-in movie screen visible from a public highway. In allowing the showing of nudity Douglas wrote, "I adhere to my view that any state or federal regulation of obscenity is prohibited by the Constitution."[87] While Erznoznik involved film, Douglas also allowed the live performance of the musical "Hair" (with its accompanying nude scene) in a public municipal auditorium.[88] Douglas limited hypothetical press utterances that threaten the administration of justice in Craig v. Harney,[89] but he softened this position in New York Times Co. v. United States. In Douglas' view, the clear wording of the First Amendment leaves ". . . . no room for governmental restraint on the press."[90] Protecting the press within the context of court proceedings, Douglas argued in Branzburg v. Hayes that reporters need not appear before, nor divulge their sources to, a grand jury.[91] In Dennis v. Unites States[92] Douglas limited hypothetically the advocacy of assassination of the President but later allowed it in Watts v. United States. Identifying numerous historical examples where harsh punishments were dealt to citizens who verbally threatened those in power, Douglas wrote, "Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution."[93] Thus, by first limiting hypothetical rather than actual behavior, and then by hedging even his limits on the hypothetical behavior, Douglas moved steadily toward protecting speech.

A second implicit argument favoring free speech arises from those cases in which Douglas did limit the speech behavior before the Court. While Douglas limited speech, he did so rarely and only under special circumstances. This lack of limits itself argues near absolutism.

Twice Douglas limited speech arguing that speakers cannot force an audience to listen. In Public Utilities v. Pollack Douglas held that streetcar passengers constitute a captive audience, and that forcing them to listen to radio programs violated their privacy rights.[94] He invoked this reasoning again in Lehman v.

City of Shaker Heights: "While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it."[95]

Douglas recognized the power of Congress to regulate labor relations in interstate industries upholding compulsory union membership in Railway Employees Department v. Hanson.[96] Douglas put aside the petitioner's contention that compulsory union membership supplants First Amendment rights of freedom of conscience, expression, and association. Railway thus represents Douglas' third authored opinion in which free speech issues yielded to other concerns.

Finally, Douglas limited free speech in Giboney v. Empire Storage Company silently joining the Court's majority opinion.[97] While Giboney was not an authored opinion, Douglas later wrote that he condoned the reasoning underlying the Court's decision.[98] Douglas recognized the need to limit union picketing that sought an agreement constituting a conspiracy in restraint of trade.

These four cases focusing on a narrow range of speech in special circumstances, comprise the sum of speech limitations in Douglas-authored opinions following the Second World War. Douglas limited speech that confronted a captive audience or Congress' power to regulate labor relations, or that constituted a conspiracy in restraint of trade. However, within the context of the high volume of opinions authored by Douglas during this period, only three instances of limiting speech suggest instead near absolutism.

A final implicit argument favoring expression assumed the form of a void. While Douglas reversed earlier positions to give expression wider protection, no reversals of earlier positions gave expression less protection. Implicitly, Douglas fashioned a solid case for protecting expression by limiting hypothetical speech, by limiting actual speech rarely and only in special circumstances, and by reversing positions only to favor free speech. Taken together, Douglas' explicit and implicit arguments gave the broad sweep of the First Amendment full support.

III. The Douglas Free Speech Philosophy

Emerson, in a 1974 essay honoring Douglas' record tenure on the Supreme Court, described Douglas as having " . . . . broad philosophical premises that envision the first amendment as the keystone of an open democratic society."[99] Emerson did not enumerate Douglas' philosophical premises, but later authors labelled Douglas' philosophy. In an essay entitled "Justice William O. Douglas' Humanism: A Copernican Revolution in Law," Murphy documented Douglas' humanism, quoting Douglas' lectures, books, and papers and citing Douglas' activities and personal history.[100] Murphy compared Douglas to humanists in other disciplines, but stopped short of stating Douglas' specific philosophical tenets, nor did he analyze the impact of that philosophy on Douglas' First Amendment thinking. Glennon characterized Douglas as an egalitarian individualist, but noted that Douglas' approach drew charges of "inconsistency" and "subjectivity" in Court decisions: "His willingness to torture statutes, to disregard precedent, to bend logic, and to rewrite history so ignored the accepted canons of law as to be insulting."[101] If Douglas disregarded previously accepted means of interpreting the law, then the broad philosophical premises mentioned by Emerson may have stood in their stead.

As previously documented, in the sum of Douglas' tenure beyond his first years on the Court, Douglas emerged as a consistent defender of freedom of speech. In his written opinions Douglas protected pure speech in all cases, placed no limits on what media serve expression of beliefs, and argued time and again the need to separate speech from actions. In most cases speech was protected and in many actions if they served as symbolic conduct. Though reviled for his illogical and inconsistent reasoning, Douglas fashioned a consistent record in First Amendment cases. Douglas emerged as near absolutist, reversing previous decisions in which he felt he erred, discarding tests no longer servicable to his purpose, and setting narrow and "hypothetical" limits

on free speech. Thus, some set of central beliefs guided Douglas' First Amendment thinking, such that consistent and plainly worded, if not legally orthodox, opinions resulted. By reviewing Douglas' definitions of speech and the criteria he provided for interpreting the freedom of speech clause of the First Amendment, we come full circle, arriving finally at the tenets by which Douglas approached freedom of speech cases.

Four presuppositions constituted Douglas' free speech philosophy. First, for Douglas people, not government, were the sovereign rulers of their destiny. While government can regulate the behavior of its citizenry, citizens can alter or replace that government. Second, Douglas valued the subjectivity underlying individual beliefs and tastes. What is rejected by some as utterly without value may be prized and sought by others. Third, Douglas valued free choice. People are choice makers, by nature expressing their will. From the myriad of options available, people choose some over others. Further, in seeking to influence their condition, people attempt to sway the beliefs of others--sometimes by name-calling, sometimes by stretching, overstating, or misstating facts, and sometimes with raised impassioned voices. Fourth, Douglas believed that people will choose wisely if fully informed, if allowed access to all sides of issues. Truth will emerge if all voices are heard.

Sovereignty of the People

Two consistent Douglas positions appear founded on a shared philosophical premise: the people should rule. That pure speech, regardless of content, should always be protected, and that the First Amendment is in a preferred position were based in part on Douglas' valuing of people governing their own destiny. These positions are logical extensions of that premise to which he often alluded and sometimes made explicit.

Douglas held all pure speech above regulation. Taking the First Amendment literally, he argued that excepting any speech from that protection weakens the First Amendment and makes the rule of the people fully vulnerable. His opinions on obscenity exemplify his philosophical position demanding sovereignty of the people. In a ruling related to the film "I Am Curious Yellow," Douglas wrote that, "The 'obscenity' issue raises large questions. To what extent may government watch over one's shoulders as he reads?"[102] Censoring obscenity, he argued, would be only the first of many possible exceptions:

> If "obscenity" can be carved out of the First Amendment, what other like exceptions can be created? Is "sacrilege" also beyond the pale? Are utterances or publications made with "malice" unprotected? How about "seditious" speech or articles?[103]

Douglas' stand on revolution as acceptable content for protected speech demonstrates a clear valuing of the rule of the people. The people's right to determine their destiny exists in its most basic and extreme form in their right to advocate overthrow of the government. In Scales v. United States the defendant was charged with being a member of the Communist Party knowing that it advocated overthrow of the government by force and violence. In his dissent Douglas cited the Declaration of Independence's promise of the right of the people to alter or abolish the government, declaring that, "Belief in the principle of revolution is deep in our traditions."[104] Douglas clearly indicated that his opinion was founded on the premise of the sovereignty of the people:

> To forbid the teaching of the propriety of revolution, even where the teacher believes his own lesson, is to hinder the people in the free exercise of this great sovereign right.[105]

He furthered these views in DuBois Clubs v. Clark. The Attorney General had petitioned the DuBois Clubs to register with the Subversive Activities Control Board as Communist-front organizations. Douglas dissenting again called on the

tradition of valuing the people's right to revolution:

> The word "revolution" has of course acquired a subversive connotation in modern times. But it has roots that are eminently respectable in American history. This country is the product of revolution. Our very being emphasized that when grievances pile high and there are no political remedies, the exercise of sovereign power reverts to the people.[106]

Providing freedom of speech a preferred position, Douglas viewed other societal values and institutions subservient to free speech rights. He held that regardless of who people were or what their social status or employment, their right to free speech was firmly grounded. That is, people were of central value; freedom of speech must prevail because that freedom permitted the wishes of the people to prevail. In Poulos v. New Hampshire, Douglas grounded his support of the preferred position of the First Amendment in his view of the people's sovereignty. A city ordinance disallowed holding religious meetings in public parks without a license. The Court upheld the ordinance; Douglas dissented. Douglas argued that the proscribing of limits to free speech by a legislature is a lawless act, ". . . . and the citizen can take matters in his own hands and proceed on the basis that such a law is no law at all."[107] And in Walker v. City of Birmingham he argued that, "The right to defy an unconstitutional statute is basic in our scheme."[108]

Douglas also believed that speech rights should be protected within society's institutions. He argued for speech protection for inmates within prisons,[109] for servicemen in the military,[110] for teachers within educational systems,[111] and for persons under state or federal employment.[112] Being subject to the regulation of an institution, he argued, does not supplant one's free speech rights.

Time and again, Douglas stated his philosophical premise in explicit terms: "The purpose of the Constitution and the Bill of Rights . . . . was to take the government off the backs of the people."[113] He adopted this philosophical premise giving sovereignty to the people from Jefferson who held that: "The opinions of men are not the object of civil government nor under its jurisdiction. . . ."[114] Thus Douglas' first philosophical premise clearly impacted his Court opinions. In protecting all pure speech and in embracing the preferred position of First Amendment rights, Douglas used the following guide: "Under the Constitution it is We the People who are sovereign. The people have the final say. The legislators are their spokesmen."[115]

Subjective Experience Is Valued

From the above, Douglas' tenacious support of speech rights might be argued to be based wholly on the tenet of sovereignty of the people. But Douglas' opinions suggest that a second premise guided his First Amendment philosophy: the valuing of subjective experience. Sovereignty of the people connotes the people as a collective, but subjective experience suggests the experiences, perceptions, and beliefs of unique individuals.

Douglas' struggle to distinguish speech from acts sprung from his incessant support of the right of individuals to personal beliefs. Speech was merely a manifestation of beliefs, and thus individual opinion was always valued.

Douglas appreciated the condition of human subjectivity in beliefs: what is offensive, nonconforming, alarming, or distasteful to some, may be fully valued by others. In reasoning such issues Douglas simplified matters by separating speech and acts. Once the separation was made, Douglas fully supported speech. Douglas recognized individual experience as a source of authority. What is valued depends on individual experience. He cautioned that Court attempts to rule on matters of subjective belief were doomed to failure. Douglas

separated speech and acts and protected speech as subjective belief in cases related to communism and obscenity.

In Russell v. United States a Congressional committee investigated the extent of Communist infiltration into news agencies. Douglas, arguing the importance of subjectivity of beliefs, stated that Congress cannot determine limits on employees of news agencies:

> The theory of our Free Society is that government must be neutral when it comes to the press--whether it be rightest or leftist, orthodox or unorthodox. The theory is that in a community where men's minds are free, all shades of opinion must be immune from governmental inquiry lest we end in regimentation.[116]

In this context, the phrase "all shades of opinion" left no room for limitations due to subjectivity of beliefs.

In DuBois Clubs v. Clark, Douglas explained more specifically how communism, though offensive to some, could be interpreted to mean a wide range of things, and was thus beyond the grasp of the censor:

> Communism, as an ideology, embraces a broad array of ideas. To some it has appeal because the state owns the main means of production with the result that all phases of national life are in the public sector, guaranteeing full employment. To some communism means a medical care program that reaches to the lowest levels of society. . . . To some the flowering of dance, music, painting, sculpture, and even athletics is possible only when those arts and activities move from the private to the public sector. . . . To others communism is a commitment to the atheistic philosophy and way of life. To still others, adherence to communism means a commitment to use force and violence, if necessary, to achieve that kind of socialist state.[117]

With this wide range of subjective experience possible, and with no illegal acts inseparably associated with communism, Douglas saw no room for limitations.

In Cole v. Richardson, Douglas argued that lawmakers cannot limit subjective beliefs nor can they demand advocacy of any particular experience. In his dissent, Douglas argued that the imposition of loyalty oaths was the imposition of beliefs, that loyalty oaths were a form of coercion and mind control. Distinguishing between speech and acts, Douglas said the First Amendment found impermissible any limits on ideas, and that essentially a loyalty oath dictated a way of thinking: "This oath . . . . requires that the appellee 'oppose' that which she has an indisputable right to advocate."[118]

Thus Douglas upheld the right of subjective experience, the right to think, to believe, to experience without governmental interference. Clearly, that premise was in mind as he argued the need to separate speech and acts in cases involving obscenity. Douglas admitted that some people and their ideas were ". . . . somewhat offbeat, nonconformist, and odd. But we are not in the realm of criminal conduct, only tastes and ideas."[119] Douglas viewed Court attempts to define social values as hopeless due to subjectivity in thinking--including the thinking of jurists and legislators:

> People are, of course, offended by many offerings made by merchants in this area. They are also offended by political pronouncements, sociological themes, and by stories of official misconduct. The list of activities and publications and pronouncements

> that offend someone is endless. . . . "Obscenity" at most is the expression of offensive ideas.[120]

Douglas relayed a personal view to illustrate the problem of subjectively determining legal limitations on speech: "One of the most offensive experiences in my life was a visit to a nation where bookstalls were filled only with books on mathematics and books on religion."[121] But Douglas realized the importance of not determining Court rulings on the basis of his personal opinions. He often argued to protect what he personally found offensive:

> Most of the items that come this way denounced as "obscene" are in my view trash. I would find few, if any, that had by my standards any redeeming social value.[122]

Douglas similarly denounced communism and the press while upholding their protection under the First Amendment.[123] The underlying premise was his valuing of individual subjective experience above the dictates of his or others' minds. Where the Court often decided cases on the basis of social merit, Douglas recognized such merit as individually and subjectively determined. For Douglas it was enough to value subjectivity, leaving the determination of other values to individuals. In protecting subjective experience Douglas was protecting not simply the will of the people as a whole but the will of individuals, however, diverse.

Choice Is Valued

Douglas' stance on free speech emanated from a third philosophical premise, made explicit in his 1948 book, Being An American: the valuing of free choice. He wrote: "The right of free choice on the part of all the people is the heart of our democratic philosophy."[124] Douglas viewed free speech as a particularly valuable commodity in the context of human choice.

> But under our charter all regulation or control of expression is barred. Government does not sit to reveal where the "truth" is. People are left to pick and choose between competing offerings. . . . The theory is that people are mature enough to pick and choose . . . and hopefully to move from plateau to plateau and finally reach the world of enduring ideas.[125]

Speech is the tool by which we question, by which we voice the choices we have made, by which we attempt to sway others to accept those same choices. Because choice, and thereby freely persuasive efforts, was valued by Douglas, he regarded over-zealousness by speakers as justifiable and sought to allow only the most minimal limitations on free speech:

> Emotions sway speakers and audiences alike. Intemperate speech is a distinctive characteristic of man. Hotheads blow off and release destructive energy in the process. They shout and rave, exaggerating weaknesses, magnifying error, viewing with alarm. So it has been from the beginning; and so it will be throughout time.[126]

Allowing overzealousness expanded the range of opinions the people could hear on a given issue; minimal limitations functioned to broaden the range of issues on which people could make free choices.

> Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed serve its high purpose when it includes

> a condition of unrest, creates dissatisfaction with conditions as they are, or stirs people to anger. Speech is often provocative and challenging.[127]

Though Douglas worked incessantly to separate speech from acts, urging full protection for speech not brigaded with illegal action, he was not naive about the relationship between speech and acts. He recognized that action often followed on the heels of effective speech: "The purpose of speech is not only to inform but to incite to action."[128] Within the recognition that speech is often closely interwoven with acts, Douglas argued that the protective blanket covering peoples' attempts to sway one another should be removed only under the most dire of circumstances; choice is preeminent.

From the premise of free choice, Douglas argued that limitations of free speech must be narrowly drawn to meet precise ends. This criterion served to widen Douglas' protection of free speech. His style of limiting speech in hypothetical examples of behavior more extreme than the behavior under adjudication provided broad boundaries on what was protected by the First Amendment. Later he broadened those boundaries by hedging on the limits imposed on the hypothetical examples. Douglas also reversed earlier positions to favor free speech. These beliefs and actions reveal Douglas' conviction that no choice existed for the people if the Court made the choice for them. Douglas trusted people to make sensible choices. In Paris Adult Theatre I v. Slaton Douglas wrote, "I have yet to be trapped into seeing or reading something that would offend me."[129] Douglas recognized the ability of humans to walk away from that which they choose not to see, hear, nor advocate.

So important was the premise of choice in Douglas' philosophy that in what were infrequent limits on speech, Douglas upheld the rights of a captive audience to choose, over speakers' rights. In Public Utilities Commission v. Pollak and in Lehman v. City of Shaker Heights[130] Douglas recognized that the person who does not wish to hear another's view, has choice to avoid it: "The right to be alone is indeed the beginning of all freedom."[131]

Deeming free choice of utmost value, Douglas extended the premise to give high regard to impassioned speech, to place only the most minimal limitations on free speech, and to provide the foremost choice to people: the right to not hear, to not listen, thus their own choice to eliminate a choice.

Access to Information Is Necessary to Wise Choice

Two of Douglas' free speech positions grew, in part, out of a fourth philosophical premise: people will choose wisely if fully informed; truth will "win out" if people have access to all sides of all issues. Douglas' views that 1) the medium of expression is irrelevant to free speech protection, and 2) the First Amendment is in a preferred position, are based on this fourth tenet.

Douglas argued for the protection of information presentation regardless of the medium employed. He argued for the protection of leaflets, soundtrucks, magazines, novels, singing, and the stage. In taking these positions Douglas reiterated the value of human choice believing that choice will be wise under ideal conditions. For Douglas, "ideal conditions" meant unlimited access to information.

Douglas supported protection of a variety of media for two reasons: 1) different media may be more effective for some ideas than for others, and 2) the speaker has a right to the means to express his or her view adequately. In Superior Films v. Dept. of Education Douglas argued:

> Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the

> various methods of communicating ideas . . . . Which medium will give the most excitement and have the most enduring effect will vary with the theme and the actors.[132]

But the key argument relevant to this fourth philosophical premise is the second line of reasoning Douglas used in defending varied media. Varied media are necessary to be fully informed on issues. The wealthy have access to and control of the more orthodox means of expression and thus access to communicating to the masses through those media. The less wealthy must rely on less orthodox means of expression to gain attention to their views. In Adderley v. Florida students had blocked a nonpublic jailway drive and demonstrated against segregation by singing, clapping, and dancing. Douglas argued:

> Those who do not control television, and radio, and those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction as long as the assembly and petition are peaceful.[133]

Similarly in Walker v. City of Birmingham Douglas defended the right to street parades without permits as a less costly means of expression:

> The rich can buy advertisements in newspapers, purchase radio or television time, and rent billboard space. Those less affluent are restricted to the use of handbills or petitions, or parades, or mass meetings.[134]

A second position taken by Douglas which emanates from the premise of truth through access to information is that the First Amendment is in a preferred position. In libel cases involving public figures and in cases regarding reporters' rights to keep sources confidential Douglas argued access to full information. The need for information placed the First Amendment ahead of individuals' rights to privacy and ahead of investigative bodies' rights to know sources of information. For example, in Time v. Hill Douglas argued: "Here a private person is catapulted into the news by events over which he had no control. . . . Such privacy as a person normally has ceases when his life has ceased to be private."[135] Individual rights to privacy were of less importance than the public's right to be informed. Similarly Douglas argued for the rights of reporters to maintain anonymity of sources:

> Forcing a reporter before a grand jury will have two retarding effects upon the ear and pen of the press. Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And fear of accountability will cause editors and critics to write with more restrained pens.[136]

Douglas reasoned that protection of news sources assured access to information.

A final example of Douglas' preferring First Amendment rights over other values occurred in New York Times v. United States. Here the government argued national security as a reason for prohibiting the publication of what became known as "The Pentagon Papers." Douglas argued that there was no statute prohibiting publication of unauthorized documents barring an imminent national emergency. Douglas held First Amendment rights above abstract "national interests." His decision was based on the view that information is prerequisite to wise choice:

> Open debate and discussion of public issues are vital to our national health. On public questions

> there should be "uninhibited, robust, and wide-open debate."[137]

In sum, Douglas embraced the theory that the people will choose wisely if well informed. Many of Douglas' decisions regarding available media and values in conflict with the First Amendment were decided on the basis of this philosophy. Douglas believed that free speech was instrumental to a "marketplace of ideas." Where such a market was open to all possibilities, free speech would guide people to truth.

For Douglas, sovereignty of the people, subjectivity of human belief and experience, and free choice, in the context the social need to sway the beliefs of others, demanded protection of beliefs from governmental intrusion. Access to information was deemed central to forming and holding beliefs. Douglas took to heart the concept of a marketplace of ideas where persons could propose and scrutinize ideas in an uninhibited atmosphere.

> Where ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart. Full and free discussion has indeed been the first article of our faith.[138]

For Douglas weakening the concept of the market place of ideas meant turning our backs on the integrity of the individual and on the people as a whole. For Douglas providing avenues of communication was tantamount to patriotism.

Four philosophical tenets guided Douglas through a multitude of First Amendment issues. These philosophical tenets did not surface consistently in his early Court years, but, as he wrestled with the presuppositions underlying free speech issues, Douglas emerged as a consistent and fervent protector of an individual's right to hold and express beliefs without governmental interference.

Endnotes

[1]First Amendment, United States Constitution.

[2]Haig Bosmajian, Justice Douglas and Freedom of Speech (Metuchen, N.J.: Scarecrow, 1980), xiv.

[3]Albert P. Blaustein and Roy M. Mersky, The First One Hundred Justices (Hamden, Connecticut: Archon, 1978), 34-38, 117-118.

[4]Ibid., p. 145.

[5]Craig v. Harney, Sheriff, 331 U.S. 367 (1947).

[6]Rosenblatt v. Baer, 383 U.S. 75, 90 (1965); see also Time, Inc. v. Hill, 385 U.S. 374 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1973); Letter Carriers v. Austin, 418 U.S. 264, 288-289 (1973); Cantrell et al. v. Forest City Publishing Company et al., 419 U.S. 245 (1974).

[7]Roth v. United States, 354 U.S. 476 (1957).

[8]Paris Adult Theatre v. Slaton, 413 U.S. 49, 71 (1972); see also Smith v. California, 361 U.S. 147 (1959); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al. v. Attorney General of Massachusetts, 383 U.S. 413 (1965); Ginsburg v. New York, 390 U.S. 629 (1968); Byrne v. Karalexis, 396 U.S. 976 (1969); Miller v. California, 413 U.S. 15 (1972).

[9]Jones v. Board of Education, 397 U.S. 31 (1969).

[10]Byrne v. Karalexis, 396 U.S. 976, 981 (1969).

[11]Saia v. New York, 334 U.S. 558, 561 (1948).

[12]Superior Films, Inc. v. Department of Education of Ohio, 346 U.S. 587, (1953); Freedman v. Maryland, 380 U.S. 51 (1964), Southeastern Promotions, Ltd., v. Conrad, 420 U.S. 546 (1974).

[13]Spence v. Washington, 418 U.S. 405 (1973).

[14]Adderley v. Florida, 385 U.S. 39, 51 (1966).

[15]Superior Films, Inc. v. Department of Education of Ohio,346 U.S. 587, 589 (1953).

[16]Roth v. United States, 354 U.S. 476, 509 (1957).

[17]Milk Wagon Drivers, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

[18]Ibid., p. 293.

[19]L. A. Powe, Jr., "Evolution to Absolutism: Justice Douglas and the First Amendment," Columbia Law Review, 74 (1974), 376.

[20]Powe, p. 376.

[21]Bakery Drivers Local v. Wohl, 315 U.S. 769, 775 (1942).

[22]Milk Wagon Drivers, Local 753 v. Meadowmoor Dairies, Inc. 312 U.S. 287 (1941); Bakery Drivers Local v. Wohl, 315 U.S. 769 (1942).

[23]Teamsters v. Vogt, 354 U.S. 284, 297 (1957).

[24]Ibid., p. 296.

[25]Communist Party v. Control Board, 351 U.S. 115 (1956).

[26]Walker v. City of Birmingham, 389 U.S. 307 (1966); Food Employees v. Logan Plaza, 391 U.S. 308 (1967).

[27]Hannegan v. Esquire, 327 U.S. 146 (1946); Winters v. New York, 333 U.S. 507 (1948); Butler v. Michigan, 352 U.S. 380 (1957); Superior Films, Inc. v. Department of Education, 346 U.S. 587 (1954).

[28]Roth v. United States, 354 U.S. 476, 511 (1957).

[29]Ibid., p. 514.

[30]See, e.g., Smith v. California, 361 U.S. 147 (1959); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al. v. Attorney General of Massachusetts, 383 U.S. 413 (1965).

[31]A Book Named "John Cleland's Memoirs of a Woman of Pleasure" et al. v. Attorney General of Massachusetts, 383 U.S. 431, 428 (1965).

[32]Black v. Cutter, 351 U.S. 292 (1956).

[33]Yates v. United States, 354 U.S. 298 (1957).

[34]Beilan v. Board of Public Education, 357 U.S. 399, 414 (1958).

[35]Ibid., p. 416; also see Scales v. United States, 367 U.S. 203 (1961), and Schneider v. Smith, Commandant, United States Coast Guard, 390 U.S. 17 (1967), in which Douglas specified acts which could be regulated.

[36]Gibson v. Florida Legislative Commission, 372 U.S. 539, 573-574, quoted from The Works of Thomas Jefferson, Fed. ed., 1904, Vol. 2, pp. 440-441.

[37]See, e.g., Parker v. Levy, 417 U.S. 733 (1974); Branzburg v. Hayes, 408 U.S. 711 (1971).

[38]Beauharnais v. Illinois, 343 U.S. 250, 285 (1952).

[39]Poulos v. New Hampshire, 345 U.S. 395, 423 (1952).

[40]Ginzburg v. United States, 383 U.S. 483, 492 (1965).

[41]Dyson v. Stein, 401 U.S. 200, 208 (1971).

[42]In determining Douglas' early record, we examine both his authored opinions and his decisions when joining the opinions of other justices.

[43]Powe, p. 372.

[44]Viereck v. United States, 318 U.S. 236 (1943); Hartzel v. United States, 322 U.S. 680 (1944); Keegan v. United States, 325 U.S. 478 (1945). Douglas supported free speech in Milk Wagon Drivers, Local 753 v. Meadowmoor Dairies, Inc. 312 U.S. 287 (1941); Carpenters & Joiners Local 213 v. Ritters Cafe, 315 U.S. 722 (1942); Jones v. Opelika, 316 U.S. 584 (1942); In Re Summers, 325 U.S. 561 (1945).

[45]Schneider v. State, 308 U.S. 147 (1939); Thornhill v. Alabama, 310 U.S. 88 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1940); American Federation of Labor v. Swing, 312 U.S. 321 (1941); Bridges v. California, 314 U.S. 252 (1941); Jamison v. Texas, 318 U.S. 413 (1943); Largent v. Texas, 318 U.S. 418 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Douglas v. City of Jeannette, 319 U.S. 157 (1943).

[46]Minersville School District v. Gobitis, 310 U.S. 586 (1940).

[47]Cox v. New Hampshire, 312 U.S. 569 (1941).

[48]Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[49]Valentine v. Chrestensen, 316 U.S. 52 (1942).

[50]National Broadcasting Company v. United States, 319 U.S. 190 (1943).

[51]Hotel Employees Local 122 v. Wisconsin Employment Relations Board, 315 U.S. 437 (1942).

[52]Prince v. Massachusetts, 321 U.S. 158 (1944).

[53]Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

[54]Nye v. United States, 313 U.S. 33 (1941); Bakery Drivers Local v. Wohl, 315 U.S. 769 (1942); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Schneiderman v. United States, 320 U.S. 118 (1943); Follett v. McCormick, 321 U.S. 573 (1944); United States v. Ballard, 322 U.S. 78 (1944); Thomas v. Collins, Sheriff, 323 U.S. 516 (1945).

[55]William O. Douglas, The Court Years: 1939-1975 (New York: Random House, 1980), pp. 43-44.

[56]Ibid., p. 280.

[57]Bosmajian, p. xv.

[58]Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[59]Branzburg v. Hayes, 408 U.S. 665, 713 (1972); also see 408 U.S. 665, 716-717 (footnote 6) (1972).

[60]Beauharnais v. Illinois, 343 U.S. 250, 284-285 (1952); although in his autobiography, Douglas disavowed ever using the clear and present danger test (Douglas, p. 103).

[61]Brandenburg v. Ohio, 395 U.S. 444, 452 (1969); also see Branzburg v. Hayes, 408 U.S. 665, 716 (footnote 5) (1972).

[62]Minersville School District v. Gobitis, 310 U.S. 586 (1940).

[63]West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

[64]Valentine v. Chrestensen, 316 U.S. 52 (1942).

[65]Cammarano v. United States, 358 U.S. 498 (1959).

[66]Pittsburgh Press v. Human Relations Commission, 413 U.S. 376 (1973).

[67]Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961).

[68]Dubois Club v. Clark, 389 U.S. 309 (1967).

[69]National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[70]Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973).

[71]Rosenblatt v. Baer, 383 U.S. 75 (1966); Letter Carriers v. Austin, 418 U.S. 264 (1974); Adler v. Board of Education, 342 U.S. 485 (1952); Cole v. Richardson, 405 U.S. 676 (1972); Younger v. Harris, 401 U.S. 37 (1971); Beauharnais v. Illinois, 343 U.S. 250 (1952); Terminiello v. Chicago, 337 U.S. 1 (1949); Feiner v. New York, 340 U.S. 315 (1951).

[72]United States v. Harriss, 347 U.S. 612 (1954); Ashton v. Kentucky, 384 U.S. 195 (1966); Pell v. Procunier, 417 U.S. 817 (1974); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1974); also see Branzburg v. Hayes, 408 U.S. 665, 717-718 (footnote 7) (1972).

[73]Saia v. New York, 334 U.S. 558 (1948); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Poulos v. New Hampshire, 345 U.S. 395 (1953); Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Kingsley Books v. Brown, 354 U.S. 426 (1957); Southeastern Promotions v. Conrad, 420 U.S. (1974); New York Times v. United States, 403 U.S. 713 (1971).

[74]Scales v. United States, 367 U.S. 203 (1961); Branzburg v. Hayes, 408 U.S. 665 (1972); also see Roth v. United States, 354 U.S. 476 (1957); Thomas v. Collins, 323 U.S. 516 (1945); Beauharnais v. Illinois, 343 U.S. 250 (1952).

[75]Feiner v. New York, 340 U.S. 315, 331 (1951).

[76]Dennis v. United States, 341 U.S. 494, 581 (1951).

[77]Jones v. Board of Education, 397 U.S. 31, 33-34 (1970).

[78]Roth v. United States, 354 U.S. 476, 512 (1957).

[79]Adderley v. Florida, 385 U.S. 39, 54 (1966).

[80]Craig v. Harney, 331 U.S. 367, 373 (1947).

[81]Pell v. Procunier, 417 U.S. 817, 840 (1974).

[82]Younger v. Harris, 401 U.S. 37, 60 (1971).

[83]Beauharnais v. Illinois, 343 U.S. 250 (1952).

[84]Parker v. Levy, 417 U.S. 733, 772 (1974).

[85]Erznoznik v. City of Jacksonville, 422 U.S. 205 (1974).

[86]Roth v. United States, 354 U.S. 476 (1957).

[87]422 U.S. 205 (footnote 2) (1974).

[88]Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1974).

[89]Craig v. Harney, 331 U.S. 367 (1947).

[90]New York Times Co. v. United States, 403 U.S. 713, 720 (1971).

[91]Branzburg v. Hayes, 408 U.S. 665 (1972).

[92]341 U.S. 494 (1951).

[93]Watts v. United States, 394 U.S. 705, 712 (1969).

[94]Public Utilities Commission v. Pollak, 343 U.S. 451 (1952).

[95]Lehman v. City of Shaker Heights, 418 U.S. 913 (1974).

[96]Railway Employees' Department v. Hanson, 351 U.S. 225 (1956).

[97]Giboney v. Empire Storage Co., 336 U.S. 490 (1949).

[98]Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 377 (1973).

[99]Thomas I. Emerson, "The First Amendment," Columbia Law Review, 74 (1974), 353.

[100]Jay W. Murphy, "Justice William O. Douglas' Humanism: A Copernican Revolution in Law," in In Honor of Justice Douglas, ed. Robert H. Keller, Jr. (Westport, Connecticut: Greenwood, 1979), 3-26.

[101]Robert J. Glennon, Jr., "Do Not Go Gentle: More Than an Epitaph," Wayne Law Review, 22 (1976), 1331.

[102]Byrne v. Karalexis, 396 U.S. 976, 980 (1969).

[103]Ibid., p. 981.

[104]Scales v. United States, 367 U.S. 203, 268 (1961).

[105]Ibid., 278.

[106]Dubois Clubs v. Clark, 389 U.S. 309, 315-316 (1967).

[107]Poulos v. New Hampshire, 345 U.S. 395, 423 (1953).

[108]Walker v. City of Birmingham, 388 U.S. 307, 336 (1967).

[109]Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 417 U.S. 396 (1974).

[110]Parker v. Levy, 417 U.S. 733 (1974).

[111]Adler v. Board of Education, 342 U.S. 485 (1952).

[112]Broadrick v. Oklahoma, 413 U.S. 601 (1973); Arnett v. Kennedy, 416 U.S. 134 (1974); U.S. Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973).

[113]Schneider v. Smith, 390 U.S. 17, 25 (1967); DuBois Clubs v. Clark, 389 U.S. 309, 318 (1967).

[114]390 U.S. 17, 25 (1967).

[115]Gibson v. Florida Legislative Comm., 372 U.S. 539, 573 (1963).

[116]Russell v. United States, 369 U.S. 746, 776 (1962).

[117]DuBois Clubs v. Clark, 389 U.S. 309, 315 (1967).

[118]Cole v. Richardson, 405 U.S. 676, 689 (1972).

[119]Ginzburg v. United States, 383 U.S. 463, 489 (1966).

[120]Paris Adult Theatre I v. Slaton, 413 U.S. 49, 71 (1973).

[121]Ibid., p. 71.

[122]United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 137 (1973); See also 413 U.S. 49, 71 (1973).

[123]See Dennis v. United States, 341 U.S. 494, (1951); William O. Douglas, The Court Years: 1939-1975 (New York: Random House, 1980), 197.

[124]William O. Douglas, Being An American (New York: John Day, 1948), 12.

[125]Ginzburg v. United States, 383 U.S. 463, 492 (1966).

[126]Beauharnais v. Illinois, 343 U.S. 250, 286-287 (1952).

[127]Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[128]United States v. United Automobile Workers, 352 U.S. 567 (1957).

[129]Paris Adult Theatre I v. Slaton, 413 U.S. 49, 71 (1973).

[130]Lehman v. City of Shaker Heights, 418 U.S. 913 (1972).

[131]Public Utilities Commission v. Pollak, 343 U.S. 451, 467 (1952).

[132]Superior Films v. Department of Education, 346 U.S. 587, 589 (1954).

[133]Adderley v. Florida, 385 U.S. 39, 50-51 (1966).

[134]Walker v. City of Birmingham, 388 U.S. 307, 335 (1967).

[135]Time v. Hill, 385 U.S. 374, 401 (1967).

[136]Branzburg v. Hayes, 408 U.S. 712, 721 (1972).

[137]New York Times v. United States, 403 U.S. 713, 724 (1971).

[138]Dennis v. United States, 341 U.S. 494 584 (1951).

FREEDOM OF SPEECH BIBLIOGRAPHY: JULY 1980--JUNE 1981 ARTICLES, BOOKS, NEWSLETTERS, COURT CASES

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(This bibliography is generally limited to materials published between July 1980 and June 1981. Bibliographies for previous years appear in earlier issues of the Free Speech Yearbook.)

Articles

"Abortion Laws, Religious Beliefs and the First Amendment." Valparaiso University Law Review, 14:487-526 (Spring 1980).

Abrams, F. "Arguing the Appeal in a Media Case." Litigation, 6:17-20 (Summer 1980).

Abrams, F. "In Defense of that Biased Ignorant Rapacious Arrogant Knee-jerk Irresponsible Press." The Judges Journal, 19:10-13+ (Winter 1980).

Abrams, F. "In Defense of the Press." Michigan Bar Journal, 59:847+ (December 1980).

"Access to the Courtroom--The Right of Publicity." Annual Survey of American Law, 1980:145-89 (November 1980).

"Advertising the Economics of High Jury Awards: The Insurance Industry's Bid for Prospective Jurors to Tighten Their Purse Strings." Washington and Lee Law Review, 37:1175-91 (Fall 1980).

"Aftermath of Herbert v. Lando (99 S Ct 1635): Will Lower Courts Create Another Qualified Newsman's Privilege?" Golden Gate University Law Review, 10:691-728 (Spring 1980).

Albert, J.A. "Federal Investigation of Video Evangelism: The FCC Probes the PTL Club." Oklahoma Law Review, 33:782-823 (Fall 1980).

"All the Free Speech that Money Can Buy: Monopolization of Issue Perception in Referendum Campaigns." University of Miami Law Review, 35:157-64 (November 1980).

"Americans United for Separation of Church and State, Inc. v. HEW (619 F 2d 252): Standing to Sue Under the Establishment Clause." Hastings Law Journal, 32:975-1012 (March 1981).

Anthony, D. "The Fact Pattern Behind the Deprogramming Controversy: An Analysis and an Alternative" (in a colloquium on alternative religions: government control and the first amendment). New York University Review of Law and Social Change, 9:125p. (1979/1980).

"Anticompetitive Data Dissemination in the Medical Profession: The Conflict Between the Sherman Act and the First Amendment." Duke Law Journal, 1980:1142-71 (December 1980).

"Antidilution Statutes: A New Attack on Comparative Advertising." Boston University Law Review, 61:220-44 (January 1981).

"Antitrust--Political Boycotts Are Beyond the Scope of the Sherman Act and Privileged Under the First Amendment." Notre Dame Lawyer, 56:326-32 (December 1980).

"Antitrust--the Sherman Act is Inapplicable to a Politically Motivated But Economically Tooled Boycott Where Anticompetitive Methods Abut the First Amendment Right to Petition the Government." Drake Law Review, 30:383-95 (1980/1981).

Apfel, D. "Gag Orders, Exclusionary Orders, and Protective Orders: Expanding the Use of Preventive Remedies to Safeguard a Criminal Defendant's Right to a Fair Trial." American University Law Review, 29:439-84 (Spring 1980).

Armstrong, M. "Compulsory Religious Broadcasts and the Constitution." The University of New South Wales Law Journal, 3:345-63 (October 1980).

Aronovsky, R.G. "Metromedia, Inc. v. City of San Diego (101 S Ct 265): Aesthetics, the First Amendment, and the Realities of Billboard Control." Ecology Law Quarterly, 9:295-339 (1981).

Arons, S. and C. Lawrence, III. "Manipulation of Consciousness: A First Amendment Critique of Schooling." Harvard Civil Rights-Civil Liberties Law Review, 15:309-61 (Fall 1980).

"Attorneys' Right to Free Speech Versus Protection of Fair Trial--DR 7-107 Restricting Attorneys' Speech During Pending Litigation Only Constitutional to Protect Criminal Jury Trial from Reasonable Likelihood of Prejudice." Villanova Law Review, 25:522-36 (March 1980).

Bailey, William. "The Supreme Court and Communication Theory: Contrasting Models of Speech Efficacy." Free Speech Yearbook, 19:1-15, (1980).

Baker, C.E. "Press Rights and Government Power to Structure the Press" (in a symposium). University of Miami Law Review, 34:785-957 (July 1980).

"Barometer of Freedom of the Press: The Opinions of Mr. Justice White." Pepperdine Law Review, 8:157-87 (December 1980).

Barrett, E.L., Jr. "'Uncharted Area'--Commercial Speech and the First Amendment." UC Davis Law Review, 13:175-209 (Spring 1980).

Barron, J.A. "Rise and Fall of a Doctrine of Editorial Privilege: Reflections on Herbert v. Lando (99 S Ct 1635)." George Washington Law Review, 47:1002-29 (August 1979).

Bassiouni, M. C. "Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, and Proposals." Journal of Criminal Law and Criminology, 72:1-51 (Spring 1981).

Bayh, B. "Congresional Response to Zurcher v. Stanford Daily (98 S Ct 1970)." Indiana Law Review, 13:835-62 (June 1980).

Bayh, B. "Search and Seizure: Aftermath of Stanford Daily (Zurcher v. Stanford Daily, 99 S Ct 231)." Trial, 16:31-3 (August 1980).

Berghel, R.J. and D.J. Dempsey. "Section 8(c) of the National Labor Relations Act: Giving It Meaning" (in a symposium on constitutional and statutory liberties in the employment relationship). Mercer Law Review, 32:457-607 (Winter 1981).

"Beyond the Schoolhouse Gate: Protecting the Off-campus First Amendment Freedoms of Students." Nebraska Law Review, 59:790-807 (1980).

Bloustein, E.J. "Origin, Validity, and Interrelationships of the Political Values Served by Freedom of Expression." Rutgers Law Review, 33:372-96 (Winter 1981).

Boase, Paul H. "Samuel M.(Golden Rule) Jones: Unorthodox Champion of Free Speech." Free Speech Yearbook, 19:32-39, (1980).

"Broadcast Deregulation and the First Amendment: Restraints on Private Control of the Publicly Owned Forum." New York University Law Review, 55:517-43 (June 1980).

"Broadcasting Offensive Programming Under a New Communications Act." Columbia Journal of Law and Social Problems, 15:427-53 (1980).

"Broadcasting Seven Dirty Words: FCC v. Pacifica Foundation (98 S Ct 3026)." Boston College Law Review, 20:975-1002 (July 1979).

"Broadening of the Pentagon Papers Standard: An Impermissible Misapplication of the National Security Exception to the Prior Restraint Doctrine." University of Puget Sound Law Review, 4:123-42 (Fall 1980).

Brosnahan, J. J. "First Amendment Jury Trials." Litigation, 6:28-30 (Summer 1980).

Brosnahan, R. P. and L. B. Andrews. "Regulation of Lawyer Advertising: In the Public Interest?" (in a symposium on commercial speech). Brooklyn Law Review, 46:175p. (Spring 1980).

"Burger Court and Freedom of the Press: The Abuse of Liberty by the Press." Ohio Northern University Law Review, 7:1005-28 (October 1980).

"California Expansion of First Amendment Does Not Infringe on Federally Protected Rights." Mercer Law Review, 32:637-45 (Winter 1981).

"California's Privacy Act: Controlling Government's Use of Information?" Stanford Law Review, 32:1001-38 (May 1980).

Campbell, J. P. "A Survey: NLRB Limits on Appeals to Racial Prejudices of Employees" (in a symposium on constitutional liberties in the employment relationship). Mercer Law Review, 32:457-607 (Winter 1981).

Canby, W.E., Jr. "Commercial Speech of Lawyers: The Court's Unsteady Course" (in a symposium on commercial speech). Brooklyn Law Review, 46:175p. (Spring 1980).

Carroll, M.T. "Protecting Private Employees' Freedom of Political Speech." Harvard Journal on Legislation, 18:35-89 (Winter 1981).

"Censorship in the Public School Library--State, Parent and Child in the Constitutional Arena." Wayne Law Review, 27:167-91 (Fall 1980).

"Central Hudson Gas and Electricity Corp. v. Public Service Commission of New York, 100 S Ct 2343 (1980)." Evironmental Law, 11:767-83 (Spring 1981).

"Cessation of the Excessive Entanglement Test and the Establishment of Religion." Ohio Northern University Law Review, 7:975-86 (October 1980).

Chandler, Daniel Ross. "International Exchange of Scientific Information During Crisis: A Case Study in the Right to Communicate." Free Speech Yearbook, 19:58-66, (1980).

Chase, J.B. "Litigating a Nativity Scene Case" (in a symposium on church and state). St. Louis University Law Journal, 24:285p. (September 1980).

Chech, M.M. "Progressive (U.S. v. The Progressive Inc. 467 F Supp 990) Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls." George Washington Law Review, 48:163-210 (January 1980).

Chevigny, P.G. "Philosophy of Language and Free Expression." New York University Law Review, 55:157-94 (May 1980).

"Chilling Effect in Press Cases: Judicial Thumb on the Scales." Harvard Civil Rights-Civil Liberties Law Review, 15:685-712 (Winter 1980).

Choper, J. G. "Religion Clauses of the First Amendment: Reconciling the Conflict." University of Pittsburg Law Review, 41:673-701 (Summer 1980).

"Church v. State and the Supreme Court: The Current Meaning of the Establishment Clause." Oklahoma City University Law Review, 5:683-99 (Fall 1980).

Cohen, L. M. "Pruneyard Shopping Center v. Robins (100 S Ct 2035): Past, Present and Future." Chicago-Kent Law Review, 57:373-95 (Spring 1981).

Cohen, S.D. "Reconciling Media Access with Confidentiality for the Individual in Juvenile Court." Santa Clara Law Review, 20:405-24 (Spring 1980).

"Commercial Speech and the FTC: A Point of Departure from Traditional First Amendment Analysis Regarding Prior Restraint." New England Law Review, 16:793-829 (1980/1981).

"Commercial Speech and the Right to Privacy: Constitutional Implications of Regulating Unsolicited Telephone Calls." Columbia Journal of Law and Social Problems, 15:277-315 (1980).

"Committee for Public Education and Religious Liberty v. Regan (100 S Ct 840): New Possibilities for State Aid to Private Schools." St. Louis University Law Journal, 24:285p. (September 1980).

Compton, J.D. "Increasing Press Protection from Libel Through a New Public Official Standard: Herbert v. Lando (99 S Ct 1635) Revisited." Suffolk University Law Review, 15:79-113 (March 1981).

"Conditioning Public Employment on Political Affiliation Unrelated to Job Performance Held Unconstitutional." Washington University Law Quarterly, 59:301-9 (1981).

"Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation." Cornell Law Review, 65:1106-22 (August 1980).

"Constitutional Law-An Editorial Privilege Is Not Required by the First Amendment." University of Kansas Law Review, 28:656-63 (Summer 1980).

"Constitutional Law and Defamation--Kansas Application of 'Public Figure' Classification Found in Gertz." University of Kansas Law Review, 28:647-56 (Summer 1980).

"Constitutional Law--Balancing Right to Fair Trial Against Statutory Right of Public Access to Court Proceedings After Gannett (Gannett v. DePasquale, 99 S Ct. 2898)." Suffolk University Law Review, 14:1403-27 (Fall 1980).

"Constituional Law--First Amendment--Sincere Religious Belief, Though Not a Tenet of One's Church or Sect, Still Protected by First Amendment." Seton Hall Law Review, 11:220-9 (1980).

"Constitutional Law--First Amendment--The Public and Press Have a Right of Access to Criminal Trials Absent an Overriding Interest Articulated in Findings." Villanova Law Review, 26:183-204 (November 1980).

"Constitutional Law--Free Exercise of Religion--State May Require a Photograph on a Drivers License Though the Licensee's Religious Beliefs Prohibit Photographs of Any Type." Brigham Young University Law Review, 1980: 471-83 (1980).

"Constitutional Law--Freedom of Speech--State Court's Construction of State Constitutional Provisions Requiring Access to Shopping Center for Exercise of Free Speech Does Not Violate Owner's Rights Under First, Fifth, and Fourteenth Amendments." Hofstra Law Review, 9:289-313 (Fall 1980).

"Constitutional Law-Obscenity." American Journal of Criminal Law, 8:199-208 (July 1980).

"Constitutional Law: Speak Freely in California Shopping Centers." University of Florida Law Review, 32:760-9 (Summer 1980).

"Constitutional Law-State Regulation of Public Solicitation for Religious Purposes." Wake Forest Law Review, 16:996-1030 (December 1980).

"Constitutional Limitations on Government Disclosure of Private Trade Secret Information." Indiana Law Journal, 56:347-73 (Winter 1981).

"Constitutional Protection of Critical Speech and the Public Figure Doctrine: Retreat by Reaffirmation." Wisconsin Law Review, 1980:568-95 (1980).

"Constitutional Validity of Regulations Controlling Noncommercial Door-to-Door Canvassing and Solicitation." Missouri Law Review, 46:121-41 (Winter 1981).

Cooper, P.J. "Acquisition, Use and Dissemination of Information: A Consideration and Critique of the Public Law Perspective." Administrative Law Review. Administrative Law Section. American Bar Association, 33:81-107 (Winter 1981).

"Corporate Free Speech: First National Bank of Boston v. Bellotti (98 S Ct 1407)." Boston College Law Review, 20:1003-24 (July 1979).

"Courtroom Closure and the Rights of the Free Press." Washington University Law Quarterly, 58:945-74 (1980).

Cox, A. "Freedom of Expression in the Burger Court." Harvard Law Review, 94:1-73 (November 1980).

Day, Louis A. "Shield Laws and the Separation of Powers Doctrine." Communications and the Law, 2:1-15 (Fall 1980).

"Defamation and Media Defendants in Texas." Southwestern Law Journal, 34:847-76 (September 1980).

"Defamation and the First Amendment: Protecting Speech on Public Issues." Washington Law Review, 56:75-97 (December 1980).

"Defamation in Fiction: The Case for Absolute First Amendment Protection." American University Law Review, 29:571-94 (Spring 1980).

"Defamation of a Public Person: The Need to Provide a Forum for Reply." Loyola Law Review, 26:114-34 (Winter 1980).

"Defamation--Public Figures--Discovery--Editorial Process--Privilege." Dequesne Law Review, 18:719-33 (Spring 1980).

"Defamation, the Private Individual and Matters of Public Concern: A Proposed Resolution for Florida." University of Florida Law Review, 32:545-80 (Spring 1980).

"Defamation--The Supreme Court Places Further Limitations on Designation as a 'Public Figure' in Libel Actions." Brigham Young University Law Review, 1980:450-70 (1980).

DeMerieux, M. "Delineation of the Right to Freedom of Expression." Public Law, 1980:359-66 (Winter 1980).

Denniston, Lyle. "A Restrained Right." The Quill, 68:12-14 (September 1980).

Denniston, Lyle. "The Press: Protecting Sources." The Quill, 69:10-11 (July/August 1981).

"Developments Under the Freedom of Information Act--1980." Duke Law Journal, 1981:338-76 (April 1981).

"Discharge of Public Employees Solely Because of Party Affiliation Violates the First and Fourteenth Amendments to the Constitution Unless Party Affiliation Is an Appropriate Requirement for Effective Performance of Public Office." University of Cincinnati Law Review, 49:892-901 (1980).

Drake, J.A. "Attempted State Control of the Religious School: Congress Shall Make No Law Inhibiting the Free Exercise of Religion?" Ohio Northern University Law Review, 7:954-74 (October 1980).

Durso, J. J. and R. T. Brice. "NLRB v. Catholic Bishop of Chicago (99 S Ct 1313): Government Regulation Versus First Amendment Religious Freedom" (in a symposium on church and state). St. Louis University Law Journal, 24: 285p. (September 1980).

Eades, R. W. "Title VII of the Civil Rights Act of 1964--an Unconstitutional Attempt to Establish Religion." University of Dayton Law Review, 5:59-75 (Winter 1980).

"Editorial Privilege: Herbert v. Lando (99 S Ct 1635)." Boston College Law Review, 21:1223-48 (July 1980).

Edwards, C.A. and L. A. Brooks, III. "The 'Squeaky Wheel' Employee: To Grease Or To Replace and the Costs of Each" (in a symposium on constitutional and statutory liberties in the employment relationship). Mercer Law Review, 32:457-607 (Winter 1981).

"Encyclopedia Britannica, Inc. v. FTC (605 F 2d 964)-- Beyond a 'Reasonable Remedy'?" De Paul Law Review, 29:951-71 (Spring 1980).

"Enforcement of CIA Secrecy Agreements: A Constitutional Analysis." Columbia Journal of Law and Social Problems, 15:455-505 (1980).

Eshelman, David "Freedom of Speech Bibliography: July 1979-1980." Free Speech Yearbook, 19:77-98, (1980).

"Establishment Clause and Its Application in the Public Schools." Nebraska Law Review, 59:1143-68 (1980).

"Establishment Clause and Religious Influences on Legislation." Northwestern University Law Review, 75:944-76 (December 1980).

Evans, C.D. "On the Duty of Advocating Civil Disobedience (Law Society of Alberta v. Harry Midgley: Fear and Loathing in Edmonton and Camrose)." Alberta Law Review, 18:520-36 (1980).

"Evolution of the Public Figure Doctrine Defamation Actions." Ohio State Law Journal, 41:1009-35 (1980).

"Examining the Institutional Interpretation of the Press Clause." Texas Law Review, 58:171-96 (December 1979).

Trial/Free Speech--If the Issuance of a Protective Order Pursuant to Federal Rule 26(C) Would Restrain Expression, the District Court Must Determine the Order's Constitutionality Under the First Amendment." George Washington Law Review, 48:486-508 (March 1980).

r, D.A. "Commercial Speech and First Amendment Theory." Northwestern University Law Review, 74:372-408 (October 1979).

h, J.A., Jr. "First Amendment/Sixth Amendment Rights--Problems and Progress in Press-Bar Conflicts." Journal of the Missouri Bar, 36:362-9 (September 1980).

st Amendment Case for Attorney Solicitation." Columbia Journal of Law and Social Problems, 15:101-42 (1979).

rst Amendment--Constitutional Right of Access to Criminal Trials." Journal of Criminal Law and Criminology, 71:547-57 (Winter 1980).

irst Amendment Proscriptions on the Integrated Bar: Lathrop v. Donohue Re-examined." Arizona Law Review, 22:939-72 (1980).

irst Amendment Right of Access to Governmental Information: A Presumption of Open Trials." Creighton Law Review, 14:853-74 (1981).

irst Amendment Right of Access to Sex Crime Trials." Boston College Law Review, 22:361-84 (January 1981).

First Amendment Rights--Public Employees May Speak a Little Evil." Western New England Law Review, 3:289-310 (Fall 1980).

First and Ninth Amendment Theory of a Right of Access to Criminal Trials." Western New England Law Review, 2:723-58 (Spring 1980).

Fischer, Louis. "Who Says Teachers Have Rights" (in a symposium on speech: the first freedom). Update, 4:14-17+ (Spring 1980).

Frank, J. P. "Judge Wright and the First Amendment." Hastings Constitutional Law Quarterly, 7:879-905 (Summer 1980).

"Free Exercise and the Attorney/Priest: The Clerical Collar in the Courtroom." Fordham Urban Law Journal, 9:51-87 (1980-1981).

"Free Speech--Fair Trial Controversy: DR 7-107." Washington and Lee Law Review, 37:219-35 (Winter 1980).

"Free Speech Rights of Homosexual Teachers." Columbia Law Review, 80:1513-34 (November 1980).

"Freedom of Expression: State Constitution Broadens Rights on Privately Owned Property Beyond Boundaries of Federal Constitution." Washburn Law Journal, 20:453-9 (Winter 1981).

"Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation." Iowa Law Review, 65:1471-96 (July 1980).

Friendly, F.W. "Order in the Court--Freedom in the Newsroom" The Judges Journal, 20:14-17+ (Winter 1981).

Fuchsberg, J.D. "Commercial Speech: Where It's At" (in a symposium on commercial speech). Brooklyn Law Review, 46:175p. (Spring 1980).

"Future of Content Regulation in Broadcasting." California Law Review, 69:555-98 (March 1981).

Gaffney, E.M., Jr. "Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy" (in a symposium on church and state). St. Louis University Law Journal, 24:285p. (September 1980).

Gard, S.W. "Fighting Words as Free Speech." Washington University Law Quarterly, 58:531-81 (1980).

Gee, E.G. "Teacher Dismissal: A View from Mount Healthy." Brigham Young University Law Review, 1980:255-73 (1980).

"Gertz and the Public Figure Doctrine Revisited." Tulane Law Review, 54:1053-93 (June 1980).

Glasser, Theodore L. and Harvey Jassem. "Indecent Broadcasts and the Listener's Right of Privacy." Journal of Broadcasting, 24:285-300 (Summer 1980).

Glasser, Theodore L. "Newsworthy Accusations and the Privilege of Neutral Reportage." Communication Quarterly, 28:49-56 (Spring 1980).

Goetsch, C.C. "Parody as Free Speech--the Replacement of the Fair Use Doctrine by First Amendment Protection." Western New England Law Review, 3:39-66 (Summer 1980).

Gold, J.A. "Does the Hyde Amendment Violate Religious Freedom? Harris v. McRae (100 S Ct 2671) and the First Amendment." American Journal of Law and Medicine, 6:361-72 (Fall 1980).

Goldsmith, R. "Poorly Financed Causes of Little People: How Can They Survive the Multitude of Regulations?" The John Marshall Law Review, 14:319-39 (Spring 1981).

Goodwin, A.T. "Press-Court Relations: Can They Be Improved?" Hastings Constitutional Law Quarterly, 7:633-42 (Spring 1980).

Gorden, William I. and Dominic A. Infante. "Attitudes Toward Free Speech: Trends, Measurement and Individual Difference Considerations." Free Speech Yearbook, 19:115-125 (1980).

Greenawalt, K. "Speech and Crime." American Bar Foundation Research Journal, 1980:645-785 (Fall 1980).

Gurfein, M. I. "Nathaniel Goldstein Memorial Lecture." Cardozo Law Review, 2:15-30 (Fall 1980).

Haiman, Franklyn S. "Carving Exceptions Out of the First Amendment." Update, 4:4-7+ (Spring 1980).

Harley, W.G. "Tender Vines" (a panel of speech and press among countries). American Society of International Law Proceedings, 73:183-203 (April 1979).

Henkin, L. "Comment" (a panel of speech and press among countries). American Society of International Law Proceedings, 73:183-203 (April 1979).

"Herbert v. Lando (99 S Ct 1635): Advancing the New York Times Co. v. Sullivan Standard Through State of Mind Discovery in the Editorial Process." George Mason University Law Review, 3:189-206 (Spring 1980).

"Herbert v. Lando (99 S Ct 1635): Editorial Process Denied a Discovery Privilege." Ohio Northern University Law Review, 7:139-47 (January 1980).

"Herbert v. Lando (99 S Ct 1635): The Rise and Fall of 'Editorial Privilege'." South Texas Law Journal, 20:372-80 (1979).

"Herbert v. Lando (99 S Ct 1635): The Supreme Court's Infidelity to New York Times Co. v. Sullivan." UC Davis Law Review, 13:374-97 (Spring 1980).

Hicks, H. Thomas "Media Cross-Ownership: National Citizens Committee for Broadcasting v. FCC." Journal of Communications and Entertainment Law, 3:545-577 (Spring 1980).

Higdon, P.R. "Burger Court and the Media: A Ten-year Perspective." Western New England Law Review, 2:593-680 (Spring 1980).

"History and Utility of the Supreme Court's Present Definition of Religion." Loyola Law Review, 26:87-113 (Winter 1980).

Hitchcock, J. "The Supreme Court and Religion: Historical Overview and Future Prognosis" (in a symposium on church and state). St. Louis University Law Journal, 24:285p. (September 1980).

Holifield, B. C. and H. L. Kirby. "First Amendment on the College Campus." Florida Bar Journal, 55:273-8 (April 1981).

"Holistic Medicine and Freedom of Religion." Tulsa Law Journal, 15:644-64 (Spring 1980).

Hudson, David D. "The Effects of Censorship on the Valuation of Sexually Explicit Messages." Free Speech Yearbook, 19:51-57 (1980).

Hunt, D. "Why No First Amendment? The Role of the Press in Relationship to Justice." Australian Law Journal, 54:458-65 (August 1980).

Hurowitz, Cydney Ann "Peeking Behind Judicial Robes: A First Amendment Analysis of Confidential Investigations of the Judiciary." Journal of Communications and Entertainment Law, 4:707-731 (Summer 1980).

"Immunity for Defamation in Press Releases and Newsletters." New York Law School Review, 25:1045-60 (1980).

"In Cold Type: Statutory Approaches to the Problem of the Offender as Author." Journal of Criminal Law and Criminology, 71:255-74 (Fall 1980).

"Independent Interpretation: California's Declaration of Rights or Declaration of Independence?" Santa Clara Law Review, 21:199-237 (Winter 1981).

"Invasion of Privacy and Freedom of the Press." Drake Law Review, 29:451-78 (1979-1980).

Irons, P.G. "'Fighting Fair': Zechariah Chafee, Jr., the Department of Justice, and the 'Trial at the Harvard Club'." Harvard Law Review, 94:1205-36 (April 1981).

Jensen, Richard J. "Denial of Freedom of Speech in Jock Yablonski's Campaign for the UMWA Presidency." Free Speech Yearbook, 19:21-31 (1980).

Johnson, J.R. "Can the State Unmask the Clan?" Kentucky Bench and Bar, 45:8-9+ (April 1981).

Jones, T.D. "Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment." Howard Law Journal, 23:429-80 (1980).

"Journalist's View of the Progressive Case (U.S. v. The Progressive, Inc. 467 F Supp 990) Case: A Look at the Press, Prior Restraint, and the Amendment from the Pentagon Papers to the Future." Ohio State Law Journal, 41:1165-205 (1980).

"Judicial Review of FTC Remedial Orders Restricting Commercial Speech." Notre Dame Lawyer, 55:451-9 (February 1980).

"Judicial Screening of Class Action Communications." The New York University Law Review, 55:671-704 (October 1980).

Kahn, Frank J. and Erwin G. Krasnow. "The Public Interest in Political Broadcasting: Evaded, Eroded, and Eviscerated." Journal of Commercial and Entertainment Law,4:635-643 (Summer 1980).

Kamp, John. "Obscenity and the Supreme Court: A Communication Approach to a Persistent Judicial Problem." Communications and the Law, 2:1-42 (Summer 1980).

Kissam, P.C. "Applying Antitrust Law to Medical Credentialing." American Journal of Law and Medicine, 7:1-31 (Spring 1981).

"Kissinger v. Reporters Committee for Freedom of the Press (100 S Ct 960): The Supreme Court Denies FOIA Access to 'Lost' Documents." Loyola Law Review, 26:706-16 (Summer 1980).

Krug, Judith F. "Locked Books, Locked Minds: The Results of School Censorship." Update, 5:28-32 (Winter 1981).

Kulzick, K. E. and A. D. Hogue. "Chilled Bird: Freedom of Expression in the Eighties." Loyola of Los Angeles Law Review, 14:57-78 (December 1980).

Kupferberg, Seth. "Libel Fever." Columbia Journalism Review, 3:36-40 (September/October).

Kurland, P.B. "Irrelevance of the Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses." Drake Law Review, 29:1-13 (1979/1980).

"Lawyer and the Press." Litigation, 6:7 (Summer 1980).

Lee, R.E. "The Federal Communications Commission's Impact on Product Advertising" (in a symposium on commercial speech). Brooklyn Law Review, 46:175p. (Spring 1980).

"Legitimate Interest Privilege and the Public Disclosure Tort: Campbell v. Seabury Press." Louisiana Law Review, 41:917-28 (Spring 1981).

Leopold, P.M. "Freedom of Speech in Parliament--Its Misuse and Proposals for Reform" Public Law, 1981:30-51 (Spring 1981).

Leventhal, H. "The Press and the Courts: Freedom and Constraints." Litigation, 6:8-11 (Summer 1980).

Lewis, A. "The Right to Scrutinize Government: Toward a First Amendment Theory of Accountability" (in a symposium). University of Miami Law Review, 34:785-957 (July 1980).

"Libel and Slander--First Amendment Limitations--Business that Advertises Consumer Goods Becomes a Public Figure." Dickinson Law Review, 85:371-80 (Winter 1981).

Lind, R.C., Jr. "Justice Rehnquist: First Amendment Speech in the Labor Context." Hastings Constitutional Law Quarterly, 8:93-123 (Fall 1980).

Linsley, William A. "The Supreme Court and the First Amendment: 1979-1980." Free Speech Yearbook, 19:67-76 (1980).

Lively, D. and M.E. Leahy "Government and the Media: Regulating a First Amendment Value System." University of Florida Law Review, 31:913-32 (Fall 1979).

Lively, D. "Media Access and a Free Press: Pursuing First Amendment Values Without Imperiling First Amendment Rights." Denver Law Journal, 58:17-34 (1980).

Lively, D. and M.E. Leahy "Prior Restraints, Prisoners, Pornography and Prospectuses: A Generic Concept of the Press as a Missing Link in First Amendment Analysis." University of San Francisco Law Review, 15:179-203 (Fall 1980/Winter 1981).

Lively, D. "The Pursuit of Access in the Electronic Forum: Can Such a Right Be Wrong?" (in a symposium on commercial speech). Brooklyn Law Review, 46:175p. (Spring 1980).

Lusky, L. "Public Trial and Public Right: The Missing Bottom Line." Hofstra Law Review, 8:273-323 (Winter 1980).

Lutzker, A.P. "Campaigns on the Air: Political Broadcast Litigation." Litigation, 6:35-40+ (Summer 1980).

"Mail Order Ministries, the Religious Purpose Exemption, and the Constitution." The Tax Lawyer, 33:959-81 (Spring 1980).

Mason, R. "Supreme Court and Press Fashions," William and Mary Law Review, 22:259-79 (Winter 1980).

McCarry, G.J. "Contract of Employment and Freedom of Speech." Sydney Law Review, 9:335-55 (1981).

McConnell, W.H. "Civic Ban on Posters Affixed Without Permission to 'City Owned or Controlled Property'." Canadian Bar Review, 58:766-73 (December 1980).

Mack, C.L. and R.L. Lieberwitz "Secondary Consumer Picketing: The First Amendment Questions Remain" (in a symposium on constitutional and statutory liberties in the employment relationship). Mercer Law Review, 32:679-831 (Spring 1981).

Mackenzie, Angus "Sabotaging the Dissident Press," Columbia Journalism Review, 6:57-63 (March/April 1981).

McKey, A.D. and W. L. Eckhardt, Jr. "Reporter's Privilege: An Update." Connecticut Law Review, 12:435-64 (Spring 1980).

McNulty, J.K. "The First Amendment Versus Sixth Amendment: A Constitutional Battle in the Juvenile Courts." New Mexico Law Review, 10:311-40 (Summer 1980).

Marshall, W. P. "Village of Schaumburg v. Citizens for a Better Environment (100 S Ct 826) and Religious Solicitation: Freedom of Speech and Freedom of Religion Converge." Loyola of Los Angeles Law Review, 13:953-83 (September 1980).

"Media Cross-Ownership: National Citizens Committee for Broadcasting v. FCC (FCC v. National Citizens Committee for Broadcasting, 98 S Ct 2096)." Journal of Communications and Entertainment Law, 2:545-77 (Spring 1980).

"Media Searches After Zurcher v. Stanford Daily (98 S Ct 1970): A Statutory Approach." Santa Clara Law Review, 20:491-510 (Spring 1980).

"Members of the Public and the Press Have No Sixth Amendment Right to Attend Pretrial Criminal Proceedings." University of Detroit Journal of Urban Law, 57:547-87 (Spring 1980).

Miller, A. S. "On Politics, Democracy, and the First Amendment: A Commentary on First National Bank v. Bellotti (98 S Ct 1407)." Washington and Lee Law Review, 38:21-41 (Winter 1981).

Neuborne, B. "A Rationale for Protecting and Regulating Commercial Speech" (in a symposium on commercial speech). Brooklyn Law Review, 46:175p. (Spring 1980).

"New York Statutory Scheme Directly Reimbursing Nonpublic School Personnel for Costs Incurred from Complying with State Requirements Not Violative of Establishment Clause of First Amendment." Seton Hall Law Review, 11:72-85 (1980).

"Newsman's Qualified Privilege: An Analytical Approach." California Western Law Review, 16:331-74 (1980).

"Newspaper Guild v. NLRB (105 L R R M 2001): The Duty to Bargain and the Press." Mercer Law Review, 32:667-75 (Winter 1981).

Niccolai, F.R. "Right to Read and School Library Censorship." Journal of Law and Education, 10:23-36 (January 1981).

Niekerk, B. Van. "Silencing the Judges: A Comparative Overview of Practices Concerning Restrictions and Inhibitions on the Free Speech of Judges." The Journal of the Legal Profession, 4:157-79 (1979).

Nielsen, Richard P. "Union Contracts, Employee Participation, Plurality of Control, and Free Expression in the Media." Mass Communications Review, 7:18-22 (Spring 1980).

"NLRB v. Catholic Bishop (99 S Ct 1313): Lay Teachers Seek More Than Good Shepherd to Protect Their Rights." Mercer Law Review, 32:655-65 (Winter 1981).

"Nonpartisan Speech in the Police Department: The Aftermath of Pickering." Hastings Constitutional Law Quarterly, 7:1001-29 (Summer 1980).

"NOW (Missouri v. NOW, 620 F 2d 1301) Or Never: Is There Antitrust Liability for Noncommercial Boycotts?" Columbia Law Review, 80:1317-40 (October 1980).

Oakes, J. L. "Judge Gurfein and the Pentagon Papers." Cardozo Law Review, 2:5-14 (Fall 1980).

"Objective Criteria for Defining Religion for the First Amendment--Malnak v. Yogi (592 F 2d 197)." University of Toledo Law Review, 11:988-1018 (Summer 1980).

'Brien, D.M. "First Amendment and the Public's 'Right to Know'." Hastings Constitutional Law Quarterly, 7:579-631 (Spring 1980).

'Brien, D.M. "Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication." Villanova Law Review, 26:1-62 (November 1980).

'Brien, David M. "The Trials and Tribulations of Courtroom Secrecy and Judicial Craftmanship: Reflections on Gannett and Richmond Newspapers." Communications and the Law, 3:3-33 (Spring 1981).

'Connor, D.T."Accommodating Labor's Section 7 Rights to Picket, Solicit, and Distribute Literature on Quasi-Public Property with the Owners' Property Rights" (in a symposium on constitutional and statutory liberties in the employment relationship). Mercer Law Review, 32:579-831 (Spring 1981).

Ordinance Restricting Solicitation of Funds by Charities Restricts Freedom of Speech." Florida State University Law Review, 9:185-92 (Winter 1981).

rleans, J.H. "What Johnny Can't Read: 'First Amendment Rights' in the Classroom." Journal of Law and Education, 10:1-15 (January 1981).

rr, C. Jack. "Truth, Knowledge, and a Democratic Respect for Diversity." Free Speech Yearbook, 19:16-20 (1980).

arvlak, Frank. "Teaching About Free Speech for Students." Update, 4:8-13+ (Spring 1980).

auker, M. "The Case for FTC Regulation of Television Advertising Directed Toward Children" (in a symposium on commercial speech). Brooklyn Law Review, 46:175p. (Spring 1980).

aul, D. and R.L. Ovelmen. "Access Litigation." Litigation, 6:31-5 (Summer 1980).

earlmen, T. W. and M. J. Marks. "Broadcast Negligence: Television's Responsibility for Programming." Trial, 16:40-3 (August 1980).

Peeking Behind Judicial Robes: A First Amendment Analysis of Confidential Investigations of the Judiciary." Journal of Communications and Entertainment Law, 2:707-31 (Summer 1980).

Peering into the Courtroom: An Analysis of the Public Interest." Valparaiso University Law Review, 15:371-407 (Winter 1981).

epper, S. "Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause." Utah Law Review, 1981:309-78 (1981).

erry, M. J. "Interpretivism, Freedom of Expression, and Equal Protection." Ohio State Law Journal, 42:261-317 (1981).

evar, S. L. "Public Schools Must Stop Having Christmas Assemblies" (in a symposium on church and state). St. Louis University Law Journal Review, 24:285p. (September 1980).

feffer, L. "Equal Protection for Unpopular Sects" (in a colloquium on alternative religions: government control and the first amendment). New York University Review of Law and Social Change, 9:125p. (1979/1980).

feffer, L. Unionization of Parochial School Teachers" (in a symposium on church and state). St. Louis University Law Journal Review, 24:285p. (September 1980).

Phifer, Gregg. "H-Bomb 'Secrets' and the Progressive." Free Speech Yearbook, 19:99-114 (1980).

Platte, Mary Kay. "TV in the Courtroom: Right of Access?" Communications and the Law, 3:11-29 (Winter 1981).

Preston, William. "Freedom Fighters of the 30s" (in a symposium on speech: the first freedom). Update, 4:26-30 (Spring 1980).

"Prior Restraint--Silence Is Golden, But a Rule 23(d) Judicial Order Is An Unconstitutional Prior Restraint on Speech." Florida State University Law Review, 8:771-88 (Fall 1980).

"Private Abridgment of Speech and the State Constituions." Yale Law Journal, 90:165-88 (November 1980).

"Private Mall Becomes a Public Hall." Loyola Law Review, 26:739-49 (Summer 1980).

"Protecting the Press From Stanford Daily (Zurcher v. Stanford Daily, 98 S Ct 1970): A Federal Newsman's Work Product Privilege From Search and Seizure." Washington and Lee Law Review, 36:1177-201 (Fall 1979).

"Protecting the Public Debate: A Proposed Constitutional Privilege of Accurate Republication." Texas Law Review, 58:623-46 (March 1980).

"Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause." Duke Law Journal, 1980:766-800 (September 1980).

"Public Aid to Private Schools." Southwestern Law Journal, 34:1261-71 (February 1981).

"Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment." University of Michigan Journal of Law Reform, 13:541-69 (Spring 1980).

"Public Figure Defamation: Preseving Summary Judgment to Protect Free Expression." Fordham Law Review, 49:112-32 (October 1980).

"Public Figures and Malice: Recent Supreme Court Decisions Restricting the Constitutional Privilege." University of Richmond Law Review, 14:737-68 (Summer 1980).

"Public, the Media and the Criminal Defendant: Access to Courtrooms Prevails Over Fears of Prejudicial Publicity." West Virginia Law Review, 83:245-57 (Winter 1980).

"Public Trials and a First Amendment Right of Access: A Presumption of Openness." Nebraska Law Review, 60:169-99 (1981).

"Public's Right to Access Versus the Right to a Fair Trial: A Balancing Compromise." Baylor Law Review, 33:191-202 (Winter 1981).

Rabban, D.M. "First Amendment in Its Forgotten Years." Yale Law Journal, 90-514-95 (January 1981).

"Receivers, Churches and Nonprofit Corporations: A First Amendment Analysis." Indiana Law Journal, 56:175-202 (Fall 1980).

"Recent Church and State Cases: A Summary." St. Louis University Law Journal Review, 24:285p. (September 1980).

"Redemption Through Exemption: Unemployment Insurance and Sectarian Schools." New York University Law Review, 55:242-70 (May 1980).

"Regulating Commercial Speech: A Conceptual Framework for Analysis." Baylor Law Review, 32:235-46 (Spring 1980).

"Reilly, H. L. "The Constitutionality of Labor Unions' Collection and Use of Forced Dues for Non-bargaining Purposes" (in a symposium on constitutional and statutory liberties in the employment relationship). Mercer Law Review, 32:457-607 (Winter 1980).

"Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the Internal Revenue Code." Fordham Law Review, 49:536-60 (March 1981).

"Religious Activity in Public Schools: A Proposed Constitutional Standard." St. Louis University Law Journal Review, 24:285p. (September 1980).

"Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities." Yale Law Journal, 90:350-76 (December 1980).

"Religious Freedom: Weeding Out the Coptic Church." Stetson Law Review, 10:139-52 (Fall 1980).

"Renewed Respect for Catchall Phrases in Employment Codes." Georgia Law Review, 15:219-32 (Fall 1980).

"Reporter's Privilege: Pandratz v. District Court [(Colo) 609 2d 1101]." Denver Law Journal, 58:681-92 (1981).

"Restrictions on Attorneys' Extrajudicial Comments on Pending Litigation--the Constitutionality of Disciplinary Rule 7-107." Ohio State Law Journal, 41:771-800 (1980).

Reznek, S. G. "Gannett v. Depasquale (99 S Ct 2898) and Richmond Newspapers v. Virginia (100 S Ct 2814): Re-opening Courtroom Doors and Constitutional Windows." Capital University Law Review, 10:101-28 (Fall 1980).

Riga, P. J. "Religion, Sincerity, and Free Exercise." Catholic Lawyer, 25:246-62 (Summer 1980).

"Right of the Press and Public to Attend Criminal Trial Proceedings in Iowa." Iowa Law Review, 66:153-86 (October 1980).

"Rights in Collision: Deciding Cases in the Free Press/Fair Trial Debate." University of Cincinnati Law Review, 49:440-61 (1980).

Ripple, K. F. "Entanglement Test of the Religion Clauses--a Ten Year Assessment." U.C.L.A. Law Review, 27:1195-239 (August 1980).

"Rise and Fall of Title VII's Requirement of Reasonable Accommodation for Religious Employees." Columbia Human Rights Law Review, 11:63-86 (Spring/Summer 1980).

Robbins, T. "Religious Movements, the State and the Law: Reconceptualizing 'The Cult Problem'" (in a colloquim on alternative religions: government control and the first amendment). New York University Review of Law and Social Change, 9:125p. (1979/1980).

"Robins v. Pruneyard Shopping Center [(Cal) 592 P 2d 341]:Federalism and State Protection of Free Speech." Golden Gate University Law Review, 10:805-49 (Spring 1980).

Robinson, S. D. "Reconciling Antitrust and the First Amendment." American Bar Association Antitrust Law Journal, 48:1335-50 (August 1979).

Rosen, M.L. "Media Lament--the Rise and Fall of Involuntary Public Figures." St. John's Law Review, 54:487-518 (Spring 1980).

Ross, A.E. "Cameras in Court--Focusing in on Constitutional Problems." Hawaii Bar Journal, 15:83-7 (Summer 1980).

Rudin, M. R. "The Cult Phenomenon: Fad Or Fact?" (in a colloquim on alternative religions: government control and the first amendment). New York University Review of Law and Social Change, 9:125p. (1979/1980).

"Rule 26(c) Protective Orders and the First Amendment." Columbia Law Review 80:1645-66 (December 1980).

Rutledge, I. C. "Manipulating Forum Jurisdiction and Generating a Law of Employee Free Speech" (in a symposium on constitutional and statutory liberties in the employment relationship). Mercer Law Review, 32:457-607 (Winter 1981).

Sanchez, Heidi P. and Andrew Jay Schwartzman. "'Unequal Opportunities': Unneeded, Undesirable, and Unfair." Journal of Communications and Entertainment Law, 4:623-633 (Summer 1980).

Schaefer, F. W. D. "First Amendment, Media Conglomerates and 'Business' Corporations: Can Corporations Safely Involve Themselves in the Political Process." St. John's Law Review, 55:1-41 (Fall 1980).

Schaefer, W. V. "Defamation and the First Amendment." University of Colorado Law Review, 52:1-18 (Fall 1980).

Scharlott, B. W. "First Amendment Protection of Advertising in the Mass Media." Communications and the Law, 2:43-58 (Summer 1980).

Schauer, F. "Categories and the First Amendment: A Play in Three Acts." Vanderbilt Law Review, 34:265-307 (March 1981).

Schauer, F. "'Private' Speech and the 'Private' Forum: Givhan v. Western Line School District (99 S Ct 693)." Supreme Court Review, 1979:217-49 (1979).

Schimel, David. "If Courts Recognized Student Rights" (in a symposium on speech: the first freedom). Update, 4:23-25+ (Spring 1980).

Scholler, H. "Martin Luther on Jurisprudence--Freedom, Conscience, Law." Valparaiso University Law Review, 15:265-82 (Winter 1981).

"School Library Censorship: First Amendment Guarantees and the Student's Right to Know." University of Detroit Journal of Urban Law, 57:523-45 (Spring 1980).

"Schoolbooks, School Boards, and the Constitution." Columbia Law Review, 80:1092-124 (June 1980).

"Self-censorship after Herbert v. Lando (99 S Ct 1635): The Need for Special Pre-trial Procedure in Defamation Action." North Carolina Law Review, 58:1026-41 (June 1980).

Sherbow, T. and M. R. Craig. "Confidential Sources and Defamation Litigation." Litigation, 6:25-27 (Summer 1980).

Sherman, Edward. "Free Speech in the Military." Update, 5:25-27+ (Winter 1981).

"Shielding Editorial Conversations from Discovery: The Relationship Between Herbert v. Lando (99 S Ct 1635) and Oregon's Shield Law." Oregon Law Review, 59:477-96 (1981).

Shiffrin, S. "Government Speech." U.C.L.A. Law Review, 27:565-655 (February 1980).

Silber, Jerome S. "Broadcast Regulation and the First Amendment." Journalism Monographs, 70:1-28 (November 1980).

Silvers, Dean. "Access Rights to the Mass Media: The Hidden Channels." Free Speech Yearbook, 19:40-50 (1980).

Sims, A.B. "Right of Publicity: Survivability Reconsidered." Fordham Law Review, 49:453-99 (March 1981).

Smith, D. and R.E. Hayes. "A Christmas Carol Revisited: Humbug in the Sioux Falls (Florey v. Sioux Falls School District 49-5, 464 F Supp 911) Schools" (in a symposium on church and state). St. Louis University Law Journal Review, 24:285p. (September 1980).

"Smith v. Daily Mail Publishing Co. (99 S Ct 2667): Balancing Rehabilitation and the Publishing of Juvenile Names." Ohio Northern University Law Review, 7:148-57 (January 1980).

"Source Protection in Libel Suits After Herbert v. Lando (99 S Ct 1635)." Columbia Law Review, 81:338-65 (March 1981).

"State Constitutions and Freedom of Speech on Private Property." American Business Law Journal, 18:562-9 (Winter 1981).

"State-created Right to Petition Upon Private Property Does Not Violate the Property Owner's Fifth and Fourteenth or First and Fourteenth Amendment Rights." Drake Law Review, 30:422-36 (1980/1981).

Stephens, Mitchell and Eliot Frankel. "All the Obscenity That's Fit to Print." Washington Journalism Review, 3:15-19 (April 1981).

"Sticks and Stones: Homosexual Solicitations and the Fighting Words Doctrine." Ohio State Law Journal, 41:553-74 (1980).

"Stone v. Graham (101 S Ct 192): A Fragile Defense of Individual Religious Autonomy." Kentucky Law Journal, 69:392-418 (1980/1981).

Stonecipher, Harry W. "Is 'Actual Malice' Rule a Special Privilege for the Press?" Newspaper Research Journal, 2:35-41 (April 1981).

Stotzky, I.P. "The First Amendment and the Press" (in symposium). University of Miami Law Review, 34:785-957 (July 1980).

"Sunday Times Case [Judgment of April 26, 1979 (European Ct. of Human Rights); 18 Int'l Legal Materials 931 (1979)]: Freedom of the Press and Contempt of Court Under English Law and the European Human Rights Convention." Kentucky Law Journal, 68:971-1025 (1979-1980).

"Synercom Technology Inc. v. University Computing Co. (462 F Supp 1003): Copyright Protection for Computer Formats and the Idea/Expression Dichotomy." Rutgers Journal of Computers, Technology and the Law, 8:65-84 (1980).

"Tax Code's Differential Treatment of Lobbying Under Section 501(c)(3): A Proposed First Amendment Analysis." Virginia Law Review, 66:1513-27 (December 1980).

"Teaching of Science of Creative Intelligence/Transcendental Meditation in Public Schools Violates Establishment Clause of First Amendment." Seton Hall Law Review, 10:614-29 (1980).

"Testing Truth-in-Testing Laws: Copyright and Constitutional Claims." Columbia Law Review, 81:179-98 (January 1981).

Theberge, L.J. "U.N.E.S.C.O.'s 'New World Information Order': Colliding with First Amendment Values." American Bar Association Journal, 67:714-18 (June 1981).

"There May Be Harm in Asking: Homosexual Solicitations and the Fighting Words Doctrine." Case Western Reserve Law Review, 30:461-93 (Spring 1980).

"Threat Or the Announcement of Plant Closure?" Mercer Law Review, 32:609-18 (Winter 1981).

"Three Years Later: State Court Interpretations of the Attorney's Right to Advertise and the Public's Right to Information." Missouri Law Review, 45:562-77 (Summer 1980).

"Toward a Constitutional Theory of Expression: The Copyright Clause, the First Amendment, and Protection of Individual Creativity." University of Miami Law Review, 34:1043-75 (July 1980).

Turney, H. L. "Road to Respectability: A Woman of Pleasure and Competing Conceptions of the First Amendment." University of Dayton Law Review, 5:271-99 (Summer 1980).

"Unexploded Bomb: The Progressive (U.S. v. The Progressive, 467 F Supp 990) and Prior Restraint." Southern Illinois University Law Journal, 1980: 199-223 (June 1980).

"Union Members' Free Speech Guarantee: Does It Protect Against Discharge from Union Office?" Buffalo Law Review, 29:169-93 (Winter 1980).

"United States v. Progressive, Inc. (467 F Supp 990): The Faustian Bargain and the First Amendment." Northwestern University Law Review, 75:538-69 (October 1980).

"United States v. Progressive, Inc. (467 F Supp 990): The National Security and Free Speech Conflict." William and Mary Law Review, 22:141-60 (Fall 1980).

"Use of Adverse Publicity to Regulate Campaign Speech." Pacific Law Journal, 12:811-28 (April 1981).

Van Alstyne, W. W. "First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories." Hofstra Law Review, 9:1-37 (Fall 1980).

Vaughn, S. "First Amendment Liberties and the Committee on Public Information." American Journal of Legal History, 23:95-119 (April 1979).

"Waldbaum v. Fairchild Publications, Inc. (627 E 2d 1287): Giving Objectivity to the Definition of Public Figures." Catholic University Law Review, 30:307-33 (Winter 1981).

Walsh, John E. "How Are Communists Treated in France, Germany, and the U.S.?" (in a symposium on speech: the first freedom). Update, 4:18-22 (Spring 1980).

"War Tax Refusal Under the Free Exercise Clause." Wisconsin Law Review, 1980: 753-81 (1980).

Warren, R.S. "Libel--Some Thoughts for the Defense." Litigation, 6:12-16 (Summer 1980).

Weisberger, J.R. "Supreme Court and the Press." Michigan Bar Journal, 59:846+ (December 1980).

Weisberger, J.R. "Supreme Court and the Press: Is Accommodation Possible?" The Judges Journal, 19:14-15 (Winter 1980).

Westen, T. "The First Amendment: Barrier or Impetus to FTC Advertising Remedies?" (in a symposium on commercial speech). Brooklyn Law Review, 46:175p. (Spring 1980).

"What Johnny Can't Read: School Boards and the First Amendment." University of Pittsburg Law Review, 42:653-67 (Spring 1981).

"Where the Government Can Demonstrate a Compelling Interest Requiring That an Employee's Political Beliefs Conform to Those of the Employer, the Employee May Be Discharged on the Basis of His Political Belifes." University of Detroit Journal of Urban Law, 58:291-306 (Winter 1981).

"Whither the Limited-purpose Public Figure?" Hofstra Law Review, 8:403-23 (Winter 1980).

Wilcox, Gary B. "Implications of First Amendment Doctrine on Prohibition of Truthful Price Advertising Concerning Alcoholic Beverages." Communications and the Law, 3:49-66 (Spring 1981).

Willis, R. A., III. "A Survey of Recent Retail Facilities Non-employee Access Decisions" (in a symposium on constitutional and statutory liberties in the employement relationship). Mercer Law Review, 32:679-831 (Spring 1981).

Wimberly, J.W., Jr. and M. H. Steckel. "NLRB Campaign Laboratory Conditions Doctrine and Free Speech Revisited" (in a symposium on constitutional and statutory liberties in the employment relationship). Mercer Law Review, 32:457-607 (Winter 1981).

Winslow, P. H. and R. L. Ash. "Effects of the Big Mama Rag (CA-D.C., 9/15/80) Decision on Exempt Education Organizations: An Analysis." Journal of Taxation, 55:20-4 (July 1981).

Wolly, M.S. "What Hath Mt. Healthy (Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 97 S Ct 568) Wrought?" Ohio State Law Journal, 41:385-99 (1980).

"Wolston v. Reader's Digest Association Inc. (99 S Ct 2701): The Definition of Public Figure is Narrowed." North Carolina Law Review, 58:1042-54 (June 1980).

Yarbrough, T.E. "Press Privilege Claims and Balancing Doctrine." Alabama Law Review, 31:523-46 (Summer 1980).

Younger, I. "In Search of Premises" (in a symposium). University of Miami Law Review, 34:785-957 (July 1980).

Zerbinos, Eugenia. "The Electronic Newspaper and Freedom of the Press." Newspaper Research Journal, 2:50-58 (April 1981).

Ziegler, E.H., Jr. "Government Speech and the Constitution: The Limits of Official Partisanship." Boston College Law Review, 21:578-619 (March 1980).

Zimmerman, D.L. "Overcoming Future Shock: Estes Revisited, or a Modest Proposal for the Constitutional Protection of the News-gathering Process." Duke Law Journal, 1980:641-708 (September 1980).

Books

Anderson, Douglas A. A "Washington Merry-Go-Round" of Libel Actions. Chicago: Nelson-Hall Inc., 1980

Bosmajian, Haig. Censorship, Libraries, and the Law. New York: Neal-Schuman Publishers, 1981.

Cullen, Maurice R., Jr. Mass Media and the First Amendment. Dubuque, Iowa: William C. Brown Company, 1981.

Douglas, William O. The Court Years, 1939-1975: The Autobiography of William O. Douglas. New York: Random House, 1980.

Friendly, Fred W. Minnesota Rag: The Dramatic Story of the Landmark Supreme Court Case That Gave New Meaning to Freedom of the Press. New York: Random House, 1981.

Lieberman, Jethro K. Free Speech, Free Press, and the Law. New York: Lothrop, 1980.

Oboler, Eli M. Defending Intellectual Freedom: The Library and the Censor. Westport, Connecticut: Greenwood Press, 1980.

Pember, Don R. Mass Media Law, 2d ed. Dubuque, Iowa: William C. Brown Company, 1981.

Sanford, Bruce W. Synopsis of the Law of Libel and the Right of Privacy. New York: World Almanac Publications, 1981.

Wicklein, John. Electronic Nightmare: The New Communications and Freedom. New York: The Viking Press, 1981.

Newsletters, Digests, and Reports

The following publications regularly carry news items and reports of developments in the field of free speech:

Broadcasting. Broadcasting-Telecasting Building, 1735 DeSales Street, N.W., Washington, D.C. 20036: Broadcasting Publications, Inc.

Civil Liberties. 22 East 40th Street, New York, New York: The American Civil Liberties Union.

Communicator. 1735 DeSales Street, N.W., Washington, D.C. 20036: Radio-Television News Directors Association.

Editor & Publisher. 575 Lexington Avenue, New York, New York 10025: Editor and Publisher.

Free Speech. 5105 Backlick Road, Annandale, Virginia, 22003: Speech Communication Association.

FOI Digest. P.O. Box 858, Columbia, Missouri 65201: Freedom of Information Center.

Media Law Notes. 431 Murphy Hall, University of Minnesota 55455: Law Division, Association for Education in Journalism.

Media Law Reporter. 1231 25th Street N.W., Washington, D.C. 20037: Bureau of National Affairs.

Newsletter on Intellectual Freedom. 50 East Huron Street, Chicago, Illinois 60611: Intellectual Freedom Committee, American Library Association.

Student Press Law Center Report. 1750 Pennsylvania Avenue N.W., Washington, D.C. 20006: The Reporters Committee for Freedom of the Press.

The News Media & the Law. 1750 Pennsylvania Avenue N.W., Room 1112, Washington, D.C. 20006: The Reporters Committee for Freedom of the Press.

he Quill. 35 East Wacker Drive, Chicago, Illinois 60601: The Society of Professional Journalists, Sigma Delta Chi.

pdate. (On Law Related Education). 1155 East 60th Street, Chicago, Illinois 60637: American Bar Association. Note especially the Spring 1980 "Bicentennial Issue" on "Speech: The First Freedom" (4:2).

Court Cases

BS v. FCC, 69 L.Ed.2d 706, 101 S. Ct. , 7 Med.L.Rptr. 1563 (1981). Section 312(a)(7) of Communications Act as amended provides affirmative, promptly enforceable, limited right of reasonable access to the broadcast media for legally qualified, individual candidates seeking federal elective office, which may be invoked at the discretion of the candidate once a campaign has commenced, and that such use under FCC interpretation does not encroach the First Amendment rights of the broadcast licensees. 6-3 decision with White, Rehnquist and Stevens dissenting.

alifornia Medical Association v. FEC, 69 L.Ed.2d 567, 101 S. Ct. , (1981). Federal Election Campaign Act prohibition of individuals and unincorporated associations contributing more than $5,000 to multicandidate political committees does not violate the First Amendment nor the equal protection component of the Fifth Amendment. 5-4 decision (Blackmun concurred in part and concurred in the judgment), with Stewart, Burger, Powell and Rehnquist dissenting.

handler v. Florida, 66 L.Ed.2d 740, 101 S. Ct. , 7Med.L.Rptr. 1041 (1981). State program permitting media coverage of criminal proceedings in accordance with established standards of conduct and technology was held constitutional in the absence of a showing of prejudice in the case. 8-0 decision; Stevens did not participate.

emocratic Party of U.S. v. La Follette, 67 L.Ed.2d 82, 101 S. Ct. , (1981). The National Party rules regarding delegates to its national convention are protected by the First Amendment freedom to gather in association from state action (Wisconsin) mandating alternative delegate and selection process. 6-3 decision with Powell, Blackmun and Rehnquist dissenting.

CC v. WNCN Listeners Guild, 67 L.Ed.2d 521, 101 S. Ct. , (1981).FCC Policy Statement implementing market forces as best means of promoting diversity of programming and therefore programming is not a material factor to be considered in license renewal or transfer was held not inconsistent with Communications Act of 1934 and is a constitutional means of implementing the Act's public interest standard. 7-2 decision with Marshall and Brennan dissenting.

lynt v. Ohio, 68 L.Ed.2d 489, 101 S. Ct. , 7 Med.L.Rptr. 1335 (1981). Cases involving communications and potential state criminal prosecution must first normally exhaust judicial review in state jurisdiction prior to Supreme Court review. 5-4 decision with Stewart, Brennan, Marshall and Stevens dissenting.

ulf Oil Co. v. Bernard 68 L.Ed.2d 693, 101 S. Ct. , (1981). Lower court order limiting communication between parties, counsel, and outside persons concerning class action suit was held unconstitutional. Unanimous decision.

Haig v. Agee, 69 L.Ed.2d 640, 101 S. Ct. , 7 Med.L.Rptr. 1545 (1981). Passport Act of 1926 extends authority to the Secretary of State to revoke U.S. citizen's passport on ground that his activities are damaging to national security or foreign policy, and such revocation is not violative of his First Amendment right of criticism. 8-2 decision with Brennan and Marshall dissenting.

Heffron v. International Society for Krishna, 69 L.Ed.2d 298, 101 S. Ct. , 7 Med.L.Rptr. 1489 (1981). State fair (Minnesota) requiring sale or distribution of any merchandise including printed or written material be from locations designated on nondiscriminatory basis is not violative of First and Fourteenth Amendments. 9-0 decision on sale of merchandise and solicitations, but 5-4 decision on distribution of literature (Brennan, Marshall, Stevens and Blackmun concurring in part and dissenting in part).

Metromedia, Inc. v. San Diego, 69 L.Ed.2d 800, 101 S. Ct. , (1981). Municipal ordinance which imposes substantial prohibitions on erection of outdoor advertising displays within city violates First Amendment provisions.

New York Liquor Authority v. Bellanca, 69 L.Ed.2d 357, 101 S. Ct. , 7 Med.L. Rptr. 1500 (1981). State statute authorizing revocation of liquor licenses of establishments that also provide nude dancing held constitutional under the Twenty-first Amendment that grants authority to state to regulate the sale of liquor within its boundaries, and whatever artistic or communicative value which might attach to topless dancing under the First Amendment is overcome by the broad powers granted legislature arising under the Twenty-first Amendment. Per Curiam opinion concurred by Marshall; Brennan dissented from summary disposition; Stevens dissented.

Schad v. Mount Ephraim, 68 L.Ed.2d 671, 101 S. Ct. , 7Med.L.Rptr. 1426 (1981). Convictions arising under zoning ordinance prohibiting live entertainment applied to operators of adult bookstore featuring live nude dancing held invalid under First and Fourteenth Amendments since borough failed to justify the exclusion of live entertainment from the broad range of commercial uses permitted. 7-2 decision with Burger and Rehnquist dissenting.

Steagald v. United States, 68 L.Ed.2d 38, 101 S. Ct. , (1981). Search of petitioners' home by government agents who were attempting to serve an arrest warrant for another individual violated the petitioner's Fourth Amendment right to privacy in the absence of a valid search warrant, consent, or exigent circumstances. 7-2 decision with Rehnquist and White dissenting.

Stone v. Graham, 66 L.Ed.2d 199, 101 S. Ct. , (1980). Kentucky statute requiring posting of the Ten Commandments in public schools violates the establishment of religion clause of the First Amendment, despite the financing of such activity by voluntary and private contributions. Per Curiam decision with Burger, Blackmun, Stewart dissenting from summary reversal and Rehnquist dissenting.

Thomas v. Review Board, 67 L.Ed.2d 624, 101 S. Ct. , (1981). Denial of unemployment compensation to petitioner who terminated his employment when transferred to assignment wherein he was involved in production work contrary to his religious beliefs (denomination and personal) was violative of the free exercise clause of the First Amendment. 8-1 decision (Blackmun concurred in part and concurred in the result); Rehnquist dissented.

U.S. Postal Service v. Council, 69 L.E.2d 517, 101 S. Ct. , 7 Med.L.Rptr. 1505, (1981). Federal statute prohibiting the deposit of unstamped mailable material in approved postal letter box does not abridge First Amendment rights of groups seeking to deposit messages at private homes. 7-2 decision with Marshall and Stevens dissenting.